139-240
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1518.

ARTHUR MANCHESTER, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED OCTOBER 27, 1890.

further, that it is not liable for the injury complained of in this cause, because Douglas & Co. and the Howel Cotton Company by their own negligence contributed to said loss of said cotton; but the court instructs you that there is no evidence to sustain this defense. If the jury find that the defendant was guilty of aiding in creating, maintaining or continuing said nuisance as aforesaid, and that the cotton mentioned in said complaint was destroyed by reason thereof, and the jury find that at the time of its loss it was insured against fire by the plaintiffs, and the plaintiffs have since that time and before the bringing of this suit paid the amount of said loss to the insurer, that being the full value of the cotton, the jury will find for the plaintiffs, and will assess their damages at the sums thus paid by them, with interest at the rate of 6 per cent. per annum from the date of said payment until the present time. The defendant has pleaded that the policies of insurance mentioned in the complaint were void, because the plaintiffs had not complied with the laws of this State. Upon the evidence this defense is not sustained, and on that issue the jury will find for the plaintiffs.

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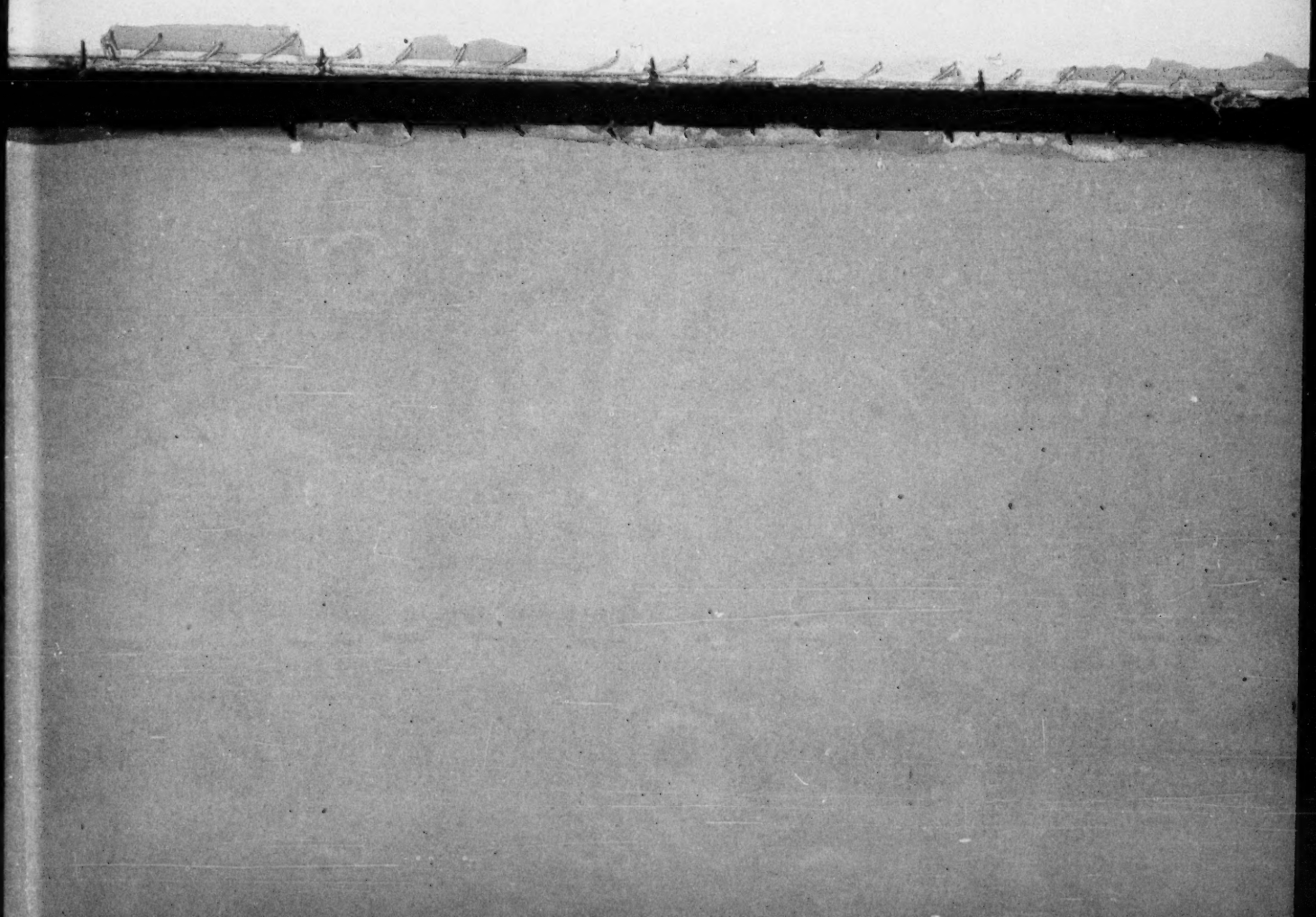

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1890.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Barnstable, within and for the county of ——, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the complaint on behalf of the Commonwealth of Massachusetts against Arthur Manchester, of Tiverton, in the State of Rhode Island, defendant, for using a purse seine for the taking of fish, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Arthur Manchester, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the third Monday of the present October term, 1890, of the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
ALBERT MASON,
Chief Justice of Superior Court.

(See over for acceptance of service of writ.)
1—1518

2 OCTOBER 15, 1890.

I accept service of the within writ and all further service thereof is waived.

A. J. WATERMAN,
Attorney General.

COMMONWEALTH OF MASSACHUSETTS, *Barnstable,* } *ss:*

And now, here, the judges of the superior court of said county make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court *court,* a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Superior Court. In testimony whereof I, Smith K. Hopkins, clerk of said superior court, have hereto set my hand and the seal of said court this sixteenth day of October, A. D. 1890.

SMITH K. HOPKINS, *Clerk.*

3 *Record.*

COMMONWEALTH OF MASSACHUSETTS, *Barnstable,* } *ss:*

Superior Court. October Sitting, 1890.

COMMONWEALTH
vs.
ARTHUR MANCHESTER.

Commonwealth of Massachusetts to Smith K. Hopkins, Esquire, a trial justice in and for the said county of Barnstable:

James W. Hurley of Wareham, in the county of Plymouth, on behalf of the Commonwealth of Massachusetts, on oath complains that Arthur Manchester, commorant of Falmouth, in the county of Barnstable, at Falmouth, in the county of Barnstable, on the 19th day of July, in the year eighteen hundred and eighty-nine, did then and there draw, set, stretch, and use a purse seine for the taking of fish in the waters of Buzzard's Bay, within the jurisdiction of this Commonwealth.

JAMES W. HURLEY,
Complainant.

4 BARNSTABLE, *ss:*

Taken and sworn to this 19th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, before me—

SMITH K. HOPKINS,
Trial Justice.

A true copy.
Attest:

SMITH K. HOPKINS,
Trial Justice.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Barnstable, }

At a court held before Smith K. Hopkins, a trial justice in and for said county, at Barnstable, in said county, on the first day of August, A. D. 1889, Arthur Manchester, of Falmouth, in said county, was brought before me, the said trial justice, by virtue of a warrant duly issued upon complaint of James W. Hurley, of Wareham, Mass., who therein complains and upon oath says that said Arthur Manchester, at Falmouth, in the county aforesaid, on the 19th
5 day of July, A. D. 1889, was guilty of the offense of illegally fishing with a purse seine, as is more fully alleged in said complaint; to which complaint the said defendant, upon being inquired of by me, the said justice, pleads and says that he is not guilty.

And now, after a full hearing and examination in said case, it appears to me, the said justice, that the said defendant is guilty. It is therefore considered and ordered by me, the said justice, that the said defendant, for the said offense, pay a fine of one hundred dollars, to the use of said Commonwealth, and costs of prosecution, taxed at eight dollars and ninety-three cents; and if said fine and costs shall not be paid as aforesaid, it is further ordered by me, the said jus-
6 tice, that the said defendant be committed to the jail in Barnstable, in said county, there to be kept and governed according to law and the rules of said jail, until he shall pay said fine and costs or be otherwise discharged by due course of law.

From which judgment and sentence said defendant appeals. Wherefore said defendant is ordered to recognize to said Commonwealth in the sum of two hundred dollars, with sufficient sureties, conditioned for his appearance before the superior court next to be holden at Barnstable, within and for said county, on the second Tuesday of October next, and that he stand committed until he so recognize.

SMITH K. HOPKINS,
Trial Justice.

A true copy of judgment.
Attest:

SMITH K. HOPKINS,
Trial Justice.

7 The foregoing appeal was entered in this court at the October term thereof, A. D. 1889, and on the sixth day of the term, to wit, the 14th day of October, A. D. 1889, the said defendant, Arthur Manchester, being set to the bar, having in the court below pleaded not guilty to said complaint, issue is now joined and the cause came on for trial; and, after a full hearing, the said cause is committed to a jury duly enpanelled and sworn to try said issue, to wit, to Isaac K. Chipman, foreman; Thomas S. Avery, Sylvester B. Atwood, Theophilus B. Baker, James H. Barnet, Heman Baxter, Oakes Coombs, Hiram E. Crowell, John M. Dineen, Jeremiah Eldridge, Freeman G. Hall, and Rufus Smith, fellows, who by
8 order of the court return into court this — and say that the said defendant, Arthur Manchester, is guilty.

Whereupon the said case is reported for the determination of the supreme judicial court for the Commonwealth ; and the said report being duly filed on the 23d day of November, A. D. 1889, and allowed by the presiding justice, the said cause is continued to await the determination of said supreme judicial court.

Afterwards, to wit, on the 18th day of September, A. D. 1890, a rescript is received from said supreme judicial court and filed, and the clerk of this court is therein ordered to enter on the docket of this court under said case: "Judgment is to be rendered on the verdict."

9 And now, at the October term of this court, A. D. 1890, the district attorney comes and moves for sentence.

It is therefore considered and ordered by the court, here, on the first day of the term, to wit, the fourteenth day of October, A. D. 1890, that the judgment of the court below be affirmed, and that the said Arthur Manchester pay a fine of one hundred dollars and the costs of prosecution, and to stand committed until he comply with said order.

BARNSTABLE, *ss :*

A true copy of the record.

Seal of the Superior Court. Witness my hand and the seal of the superior court, at Barnstable, this sixteenth day of October, A. D. 1890.

SMITH K. HOPKINS, *Clerk.*

10 BARNSTABLE, *ss :*

Superior Court. October Term, 1889.

COMMONWEALTH
vs.
ARTHUR MANCHESTER.

Report.

This was a complaint under section 1 of chapter 192 of the statutes of 1886. A copy of the complaint is annexed and made a part of this report.

The evidence of the Commonwealth tended to show that the defendant and others, who were citizens of Rhode Island and were officers and crew of the fishing steamer called the "A. T. Serrell," on the day named in the complaint were engaged in drawing, setting, stretching, and using a purse seine for the taking of fish in the waters of Buzzard's Bay. The place where the defendant was so engaged with said seine was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of said town to the south line thereof. The point where the defendant was so using said seine was within that part of Buzzard's Bay which the harbor and land commissioners, acting under the provisions of

section 2 of chapter 196 of the acts of the year 1881, had, so far as they were capable of doing so, assigned to and made a part of the town of Falmouth. A copy of the map showing boundary lines between the adjacent cities and towns bordering on Buzzard's Bay, as so located by said commissioners, was used at the trial and may be referred to. The point where the defendant was using said seine is marked "A" on said plan. The Commonwealth's evidence tended to show that the defendant and his associates, on said day and at the point described, caught with said seine a large quantity of the fish called menhaden. In this act of fishing no fixed apparatus was used and the bottom of the sea was not encroached upon or disturbed.

The Commonwealth further offered evidence tending to show that the distance between the headlands at the mouth of Buzzard's Bay, viz., at Westport, in the county of Bristol, on the one side, and the island of Cuttyhunk, in the county of Dukes *county*, on the other side, was more than one and less than two marine leagues. The island of Cuttyhunk is the most southerly of the chain of islands lying to the eastward of Buzzard's Bay, and known as the Elizabeth Islands. The distance across said bay at the point where the acts of the defendant were done is more than two marine leagues, and the opposite points are in different counties.

11

The defendant did not dispute any of the testimony offered by the Commonwealth, but introduced evidence tending to show that he was engaged in fishing for menhaden only, and that he caught no other fish excepting menhaden; that menhaden is not a food-fish and is only valuable for the purpose of bait and of manufacture into fish oil, and that the taking of said menhaden by seining does not tend in any way to decrease the quantity and variety of food-fishes.

The defendant offered evidence further tending to show that he was in the employ of the firm of Charles Cook and others, who were engaged in the State of Rhode Island in the business of seining menhaden, to be sold for bait and to be manufactured into fish oil and fish manure.

The defendant further offered testimony tending to show that it was impossible to discern objects across from one headland to the other at the mouth of Buzzard's Bay. The defendant's evidence showed that the said steamer was of Newport, Rhode Island, duly enrolled and licensed at that port under the laws of the United States for carrying on the menhaden fishery, and it was conceded by the Commonwealth that the defendant was employed upon the vessel described by said enrollment and license, and at the time of the commission of the acts complained of he and his associates were so in the employ of the vessel described in said license.

The district attorney stated that he should not controvert any of the foregoing evidence, but claimed that it was incompetent in defense of this complaint; but for the purposes of the trial I admitted the testimony.

The foregoing is all the evidence offered at the trial of this complaint. It was conceded that the defendant could not be convicted

if chapter 212 of the acts of 1865 was not repealed by the statute of 1886, chapter 192. At the conclusion of the evidence the defendant asked me to rule as follows:

1. As the Government does not claim that the act complained of is in violation of any statute except of chapter 192 of the acts of 1886, the defendants, notwithstanding that statute, *are* authorized to take menhaden, by the use of the purse seine, in the waters of Buzzard's Bay in the place where this act was committed.

2. Chapter 192 of the acts of the year 1886 did not repeal chapter 212 of the acts of the year 1865.

3. The defendants may lawfully take menhaden, by the use of the purse seine, in Buzzard's Bay in the place where the acts complained in this case were done.

12 And also:

1. The act complained of was on the high seas and without the jurisdiction of Massachusetts.

2. The act complained of having been done under a United States license for carrying on this fishery, the defendants cannot be held as criminals for violating a statute of this Commonwealth.

3. The defendants cannot be held unless the act complained of was done and committed within the body of a country, as understood at common law.

4. The statute of this Commonwealth prohibiting under a penalty the use of nets and seines and the taking of fish within three miles of the shore is invalid, especially as against a license to fish granted under the laws of the United States.

The defendant further asked me to rule that on all the evidence the defendant could not be convicted.

I declined to rule as requested by the defendant and submitted the case to the jury with the instruction that the statute of 1865 was repealed by the statute of 1886, and with the instruction that if they found that the defendant was engaged in using a purse seine for the taking of fish of any kind in that part of Buzzard's Bay which was within the jurisdiction of the Commonwealth of Massachusetts that they would be authorized to convict the defendant, and that the place where the acts of the defendants were committed, being within a marine league from the shore at low-water mark, was within the jurisdiction of the Commonwealth.

The jury returned a verdict of guilty; and now, after verdict and at the request of the defendant, and by the consent of the parties, I report the case, with my rulings at the trial of the same, for the determination of the supreme judicial court.

EDGAR J. SHERMAN,
Justice Superior Court.

Filed Nov. 23, 1889.
SMITH K. HOPKINS, *Clerk.*

A true copy.
Attest: SMITH K. HOPKINS, *Clerk.*

13 (*Copy of Complaint.*)

COMMONWEALTH OF MASSACHUSETTS:

To Smith K. Hopkins, Esquire, a trial justice in and for the county of Barnstable:

James W. Hurley, of Wareham, in the county of Plymouth, on behalf of the Commonwealth of Massachusetts, on oath complains that Arthur Manchester, commorant of Falmouth, in the county of Barnstable, at Falmouth, in the county of Barnstable, on the 19th day of July, in the year eighteen hundred and eighty-nine, did then and there draw, set, stretch, and use a purse seine for the taking of fish in the waters of Buzzard's Bay, within the jurisdiction of this Commonwealth.

JAMES W. HURLEY,
Complainant.

BARNSTABLE, *ss:*

Taken and sworn to this 19th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, before me—

SMITH K. HOPKINS,
Trial Justice.

A true copy of complaint.
Attest: SMITH K. HOPKINS,
Trial Justice.

True copies.
Attest: SMITH K. HOPKINS, *Clerk.*

[Endorsed:] Commonwealth *vs.* Arthur Manchester. Report. Barnstable county.

14 COMMONWEALTH OF MASSACHUSETTS,
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, *Sept.* 18, 1890.

In the Case of COMMONWEALTH *vs.* ARTHUR MANCHESTER, Pending in the Superior Court for the County of Barnstable.

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:
"Judgment is to be rendered on the verdict."
By the court:

HENRY A. CLAPP, *Clerk.*

September 18, 1890.
A true copy.
Attest: HENRY A. CLAPP, *Clerk.*

15 *Brief Statement of the Grounds and Reasons of the Decision.*

"The statute under which the complaint was made is constitutional and valid and no error appears in the proceedings at the trial.

See opinion on file with the reporter."

A true copy.

Attest: SMITH K. HOPKINS, *Clerk.*

16 [Endorsed:] No. 2362. Supreme judicial court for the Commonwealth. Rescript. Barnstable county. Commonwealth *vs.* Arthur Manchester. Barnstable, *ss:* Received & filed Sep. 18, 1890. Smith K. Hopkins, clerk. (Copy.)

17 Know all men by these presents that we, Arthur Manchester, of Tiverton, in the State of Rhode Island, as principal, and Isaac Brown and Nathaniel B. Church, of said Tiverton, and Ivers W. Adams, of Boston, in the Commonwealth of Massachusetts, as sureties, — holden and stand firmly bound unto the Commonwealth of Massachusetts in the sum of five hundred dollars; to the payment of which to the said Commonwealth we hereby jointly & severally bind ourselves, our heirs, executors, and administrators.

The condition of the obligation is such that whereas said Manchester, upon conviction on a complaint wherein it was charged that said Manchester did "draw, set, stretch, and use a purse seine for the taking of fish in the waters of Buzzard's Bay, within the jurisdiction of this Commonwealth," was sentenced by the superior court, sitting within and for the county of Barnstable, at a term begun and holden on the second Tuesday of October, in the year 1890, to pay a fine of one hundred dollars and costs of prosecution, and the said Manchester is now in custody under said sentence; and whereas, after said sentence was imposed and said Manchester was taken into custody thereon, the said Manchester sued out a writ of error for the rev-rsion of the judgment of said superior court in and by the Supreme Court of the United States, which writ of error is now pending:

Now, therefore, if the said Arthur Manchester shall with due diligence prosecute said writ of error to final effect, and if he shall fail to make his plea good shall pay any and all fines, damages, and costs, then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this fifteenth day of October, A. D. 1890.

ARTHUR MANCHESTER. [s.]
ISAAC BROWN. [s.]
N. B. CHURCH. [s.]
IVERS W. ADAMS. [s.]

Signed and sealed in presence of—
MARY E. MANCHESTER,
A. L. HAMBLY,
Witness to Isaac Brown & N. B. Church.
GEO. A. KING, *As to I. W. A.*

Bond ordered in the sum of five hundred dollars and the above bond approved.

ALBERT MASON,
Chief Justice of Sup. C't.

BARNSTABLE, *ss:*

A true copy.
Attest: SMITH K. HOPKINS, *Clerk.*

[Endorsed:] —— —— *to* —— ——. Bond. From the office of ——.

18 COMMONWEALTH OF MASSACHUSETTS, *Barnstable,* } *ss:*

I, Smith K. Hopkins, clerk of all the judicial courts within and for the said county of Barnstable, hereby certify that the annexed copies of the record of judgment, of the report of the rescript, and bond are true copies of said record and the papers filed in the case of The Commonwealth *vs.* Arthur Manchester.

In witness whereof I have hereunto set my hand and the seal of the superior court, at Barnstable, this sixteenth day of October, A. D. 1890.

Seal of the Superior Court.

SMITH K. HOPKINS, *Clerk.*

19 *Assignment of Errors.*

BARNSTABLE, *ss:*

Superior Court.

ARTHUR MANCHESTER, Plaintiff in Error,
vs.
THE COMMONWEALTH OF MASSACHUSETTS.

And now comes the said Arthur Manchester and assigns for errors in the proceedings and judgment the following, to wit:

That the court ruled and adjudged:

1. That the place where the alleged offence was committed was not a part of the high seas and was not under article III, section 2, of the Constitution, which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction within the exclusive jurisdiction of the Federal Government.

2. That said place, notwithstanding said provision of the Constitution, was within the jurisdiction of Massachusetts.

3. That the plaintiff in error was not authorized to do the act complained of by a license under title L of the Revised Statutes, and was not protected by such license.

4. That chapter 192 of the acts of the general court of Massa-

chusetts for the year 1886, as construed by the court, was valid notwithstanding the provisions of the Constitution and laws above cited or any provisions of the Constitution and laws of the United States.

And the plaintiff in error claims that said rulings and judgment were erroneous, and he prays that the same may be reversed and annulled.

GEO. A. KING,
JAMES F. JACKSON,
Counsel for the Plaintiff in Error.

BARNSTABLE, *ss:*

Filed Oct. 15, 1890.
A true copy.

Seal of the Superior Court.

Witness my hand and the seal of the superior court, at Barnstable, the fifteenth day of October, A. D. 1890.

SMITH K. HOPKINS,
Clerk Superior Court.

Endorsed on cover: Massachusetts superior court. No. 1518. Arthur Manchester, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed October 27, 1890.

No. 1576

SUPREME COURT U. S.
FILED
OCT 27 1890
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

ARTHUR MANCHESTER, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO ADVANCE.

chusetts for the year 1886, as construed by the court, was valid notwithstanding the provisions of the Constitution and laws above cited or any provisions of the Constitution and laws of the United States.

And the plaintiff in error claims that said rulings and judgment were erroneous, and he prays that the same may be reversed and annulled.

GEO. A. KING,
JAMES F. JACKSON,
Counsel for the Plaintiff in Error.

BARNSTABLE, *ss:*

Filed Oct. 15, 1890.
A true copy.

Seal of the Superior Court.

Witness my hand and the seal of the superior court, at Barnstable, the fifteenth day of October, A. D. 1890.

SMITH K. HOPKINS,
Clerk Superior Court.

Endorsed on cover: Massachusetts superior court. No. 1518. Arthur Manchester, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed October 27, 1890.

No. 1578

Office Supreme Court U. S.
FILED.
OCT 27 1890
JAMES. H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

ARTHUR MANCHESTER, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO ADVANCE.

Supreme Court of the United States.

ARTHUR MANCHESTER, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO ADVANCE.

And now comes the Attorney-General of the State of Massachusetts, and moves to advance said cause upon the docket of this Honorable Court, and to set said cause to be argued upon some day to be fixed by the Court.

The plaintiff in error was convicted at the October term of the superior court, Barnstable County, and sentenced to pay a fine, and stand committed until the same is paid.

This is one of a number of cases growing out of the violation of chapter 192 of the Acts of 1866, as follows: —

[CHAP. 192.]

AN ACT FOR THE PROTECTION OF THE FISHERIES IN BUZZARD'S BAY.

Be it enacted, etc., as follows:

SECTION 1. No person shall draw, set, stretch or use any drag net, set net or gill net, purse or sweep seine of any kind for taking fish anywhere in the waters of Buzzard's Bay within the jurisdiction of this Commonwealth nor in any harbor, cove or bight of said bay except as hereinafter provided.

SECT. 2. Any net or seine used in violation of any provision of this act, together with any boat, craft or fishing apparatus employed in such illegal use, and all fish found therewith, shall be forfeited; and it shall be lawful for any inhabitant or inhabitants of any town bordering on said bay to seize and detain, not exceeding forty-eight hours, any net or seine found in use contrary to the provisions of this act,

and any boat, craft, fishing apparatus and fish found therewith, to the end that the same may be seized and libelled if need be by due process of law.

SECT. 3. All nets and seines in actual use set or stretched in the waters aforesaid in violation of this act are declared to be common nuisances.

SECT. 4. Nothing contained in this act shall be construed to interfere with the corporate rights of any fishing company located on said bay nor in any way to affect the fish weirs mentioned in section seventy of chapter ninety-one of the Public Statutes, nor the use of nets or seines in lawful fisheries for shad or alewives in influent streams of said bay, nor to the use of set nets or gill nets in the waters of the town of Fairhaven within a line drawn from Commorant rock southwesterly to the buoy on West island rips and from thence westerly in a straight course through the buoy on West island ledge to the town line of Fairhaven.

SECT. 5. Whoever violates any provision of this act or aids or assists in violating the same shall pay a fine not exceeding two hundred dollars for each offence.

SECT. 6 District courts and trial justices shall have concurrent jurisdiction with the superior court of all offences and proceedings under the provisions of this act.

SECT. 7. All fines received under this act shall be paid one-half to the complainant and the other half to the Commonwealth. All moneys from any forfeitures incurred under this act shall inure and be paid one-fourth to the informer and one-fourth to the person filing the libel and the other half to the Commonwealth. [*Approved May 6, 1886.*

At the time of the arrest of the defendant, 1889, the steam vessel upon which the defendant and his associates were fishing was seized and libelled; subsequently, two other steam vessels, fishing under the same circumstances and in the same locality, were seized and libelled. The value of the property thus taken is about $25,000. Proceedings for the forfeiture of this property are now pending in the Courts of this State.

Buzzard's Bay is a body of water about thirty miles in length and ten miles in width. It is found that the headlands are less than two marine leagues apart. The alleged offence was committed within this bay, and about one and

one-quarter miles from the shore. The Commonwealth claims that it has dominion over these waters in respect to fisheries.

During the fishing season of 1890 a large number of steam vessels from other States entered the bay and engaged in fishing therein, in disregard of the law brought in question in this case, though the Commonwealth, at great expense, pursued such vessels with its police boats.

It is claimed that, should the enforcement of the law be relaxed, the interest of the State in respect to edible fish would be seriously and permanently injured; and, on the other hand, officers making seizures and arrests are threatened with personal suits by parties at interest, on the ground that they are operating without the jurisdiction of the State of Massachusetts, and upon the high seas where the United States government, and not the government of the State of Massachusetts, has control. Under the circumstances, the Commonwealth would be embarrassed in the administration of its laws by a delay in the determination of the question herein raised. The defendant formulates his claims substantially as follows: —

"Buzzard's Bay, where the alleged offence was committed, is a part of the high seas, and not within the territory of Massachusetts or subject to its jurisdiction."

"Under the constitution of the United States, the jurisdiction over Buzzard's Bay belongs to the general government; and this jurisdiction is exclusive, under the article which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction."

"The vessel to which the plaintiff in error was attached was licensed under the statute of the United States for carrying on the fishing in which she was engaged at the time of the arrest and seizure; and the plaintiff in error claims that, being employed in the taking of floating fish in tide water and on the high seas, the vessel and crew were protected by the license."

A. C. Bates
Dist Atty Gen'l

offence was committed within

51ST CONGRESS, 2d Session. | SENATE. | MIS DOC. No. 46.

IN THE SENATE OF THE UNITED STATES.

JANUARY 15, 1891.—Ordered to be reprinted as a miscellaneous document.

NOTES OF A HEARING BEFORE THE SENATE COMMITTEE ON FISHERIES, OF PARTIES INTERESTED IN THE BILL (S. 227, FORTY-NINTH CONGRESS, FIRST SESSION,) FOR THE PROTECTION OF FISHERIES ON THE ATLANTIC COAST.

THE MENHADEN FISHERY.

The bill, as proposed to be amended, was read, as follows:

[S. 227. Forty-ninth Congress, first session. In the Senate of the United States, December 9, 1885.

Mr. SEWELL introduced the following bill, which was read twice and referred to the Committee on Fisheries:

A BILL for the protection of fisheries on the Atlantic coast.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for any person or persons, by day or night, to put, place, haul, draw, or in any manner use any purse-net, pound, fyke, weir, or other appliance for the capture of menhaden upon the high seas within [two] *three* miles of the Atlantic coast, or in any arm of the sea, river, haven, creek, basin, or bay along the said coast within the jurisdiction of the United States and not within the jurisdiction of any State.

SEC. 2. That it shall not be lawful for any person or persons, by day or night, to put, place, haul, draw, or in any manner use any purse-net, pound, fyke, weir, or other appliance upon the high seas within [two] *three* miles of the Atlantic coast, or in any arm of the sea, river, haven, creek, basin, or bay along the said coast within the jurisdiction of the United States and not within the jurisdiction of any State, for the capture of fish to be manufactured into oil or into fish-guano or other fertilizing material.

SEC. 3. That any person violating the provisions of this act shall, upon conviction thereof, be liable to a penalty of one thousand dollars, of which one-fourth shall be paid to the person upon whose information the said conviction shall be had, and the remainder shall be *paid into the Treasury of the United States.*

SEC. 4. That any steam or sailing boat or vessel of any description, and any net or nets, or other apparatus or tackling, which shall be used, or shall be *knowingly* hired or loaned for the purpose of being used, in any of the aforesaid waters, contrary to the true intent and meaning of this act, shall be forfeited to the United States; and it shall be the duty of the United States marshals of the districts bordering upon the said coasts to seize the said boats, vessels, nets, tackling, or other apparatus; and any marshal making such seizure shall report the same to the United States district court judge of the district bordering upon that portion of the sea upon which such seizure is made, or of the district within which such seizure is made; and the said judge, upon satisfactory evidence that the said boats, vessels, nets, tackling, or other apparatus have been used, or have been *knowingly* hired or loaned for the purpose of being used, contrary to the true intent and meaning of this act, shall condemn the same and direct their sale at public auction by the said marshal; and the proceeds of the said sale shall be devoted, first, to the payment of the costs and charges of the said proceedings, and the remainder, if there be any, shall be [appropriated to the uses of the United States Commission of Fish and Fisheries] *paid into the Treasury of the United States.*

SEC. 5. That any boat or vessel, net or nets, or other tackling or apparatus which shall be used, or which shall be *knowingly* loaned or hired *to be used* [for the purpose of being used] for any purpose contrary to the provisions of the first or second section of this act, shall be liable for the penalty imposed by the third section of this act, for which sum the said boat, vessel, net or nets, or other tackling or apparatus may be seized in port and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

SEC. 6. *The provisions of this act shall not apply to the use of nets having meshes not less than nine inches.*

[The amendments proposed to be made are to strike out the words between brackets [ ] and to insert the words printed in *italics*.]

The CHAIRMAN (Senator PALMER). I suppose there are a number of interests to be heard. If there is no objection on the part of any member of the committee, we will first hear the fertilizing interest connected with the menhaden fisheries. I think Mr. de Ghequier and some others are here to represent that interest. Who will be your spokesman, gentlemen?

Mr. DE GHEQUIER. I am not, strictly speaking, representing the fish interest, but simply the fertilizers.

The CHAIRMAN. That is what we want to hear.

STATEMENT OF A de GHEQUIER.

Mr. A DE GHEQUIER (of Baltimore). I was at a meeting on Monday, in New York, which was attended very largely by parties from the South, the North, and the West, and at this meeting, by resolution of the members present, and afterwards by resolution of the board, the following memorial was decided upon to be presented to the Committee on Fisheries of the Senate.

Hon. THOMAS W. PALMER,
Chairman Committee on Fisheries, United States Senate, Washington, D. C.:

The National Fertilizer Association herewith begs to respectfully submit for your earnest consideration some of the reasons why Senate bill No. 227 should not be favorably reported upon and passed:

In the first place, it is not admitted that the operation of the menhaden fisheries caused any diminution of food fish along the New Jersey coast, nor that the bill will benefit any class of the community. For the menhaden, as is well known, is not, strictly speaking, a food-fish; on the other hand, the industries directly or indirectly engaged in catching, preparing, and utilizing the menhaden and its products give employment to a far greater number of men dependent for the support of their families upon their present occupations than the total number of complaining or amateur fishermen along the Jersey coast can possibly amount to.

In the second place, if it is claimed that the catch of food-fish along the Jersey coast is growing less and less, a claim which is by no means supported by facts, it would seem the part of wisdom to seek for the cause of it in a scientific way by obtaining the opinion of experts, notably the United States Commission on Fish and Fisheries, and other fishermen of experience along the whole Atlantic coast, rather than to blame for it a branch of industry which appears to have no tangible connection with diminution of fish along the Jersey coast. Were we looking for causes for this alleged decrease in food-fish along the Jersey coast, we would have to consider the immense amount of sewage emptied by the cities of New York, Brooklyn, Jersey City, Hoboken, etc., into the very waters where the decrease of fish is claimed to occur, and for other causes unnecessary to mention here.

The fertilizer trade, though not further interested in the matter than to protect the vast agricultural interests of the country with which it is so closely connected, begs to submit other reasons still.

Fish-scrap in its various forms furnishes a most valuable material for supplying fertilizers with the requisite amount of ammonia, and the extent to which this is done may be inferred from the fact that large quantities are annually consumed by the trade and converted into fertilizers. The fertilizing properties of this menhaden scrap, through the operation of the soil, produce such an enormous food supply in wheat and corn (not to mention its influence upon cotton and tobacco) that it is in this connection, and in this alone, the menhaden should be considered a "food-fish."

The destruction of the menhaden fishery means not alone an increase in the cost of food in this country, but also a decrease in the quantity and value of all products of the soil. To withdraw this source of ammonia from the agriculturist would mean, therefore, to narrow down to that extent the supply of ammoniates, and under the laws of supply and demand, the price of other sources of ammonia would be enhanced to a degree that would compel the tillers of the soil to pay an increased price for fertilizers. It is not the manufacturers, but the farmer who requires fertilizers for the proper cultivation of his land and the raising of profitable crops, who would thus be taxed for the benefit of the promoters of this bill. Besides, since nature has supplied us with a source of ammonia on our coast, and immediately and cheaply available for agriculture, from the time of the Indian down to the present day, it would seem well to hesitate before striking down this industry and placing our farming community in a state of dependence upon the importation of fertilizing material from foreign countries. And it is this aspect which, in the opinion of our association, imparts to this subject the character of a serious question of political economy.

The association foregoes to call attention to the direct effect of the passage of the bill upon the menhaden fish industry, upon the vast amount of capital and labor thrown out of employment, etc., but feels confident that a full and fair consideration of the several facts laid before you in this memorial will induce you to pause before favorably indorsing a measure which in its ultimate effects would inflict an injury upon the people of the country, whom it is the province of prudent and wise legislation to protect and guard.

By order of the board of directors of the National Fertilizer Association, at a meeting held in the city of New York, February 8, 1886.

J. M. GLIDDEN,
(*Of Boston,*) *President.*
E. H. FROST,
(*Of Charleston, S. C.*) *Vice President.*
A. DE GHEQUIER,
(*Of Baltimore,*) *Secretary.*

The CHAIRMAN. Do you wish to say anything further?

Mr. DE GHEQUIER. I simply wish to say that there is only one available source of ammonia outside of this.

The CHAIRMAN. Are those ideas incorporated in these resolutions?

Mr. DE GHEQUIER. This memorial which I have just read, and of which the original is in your hands, embodies about all we wish to say.

The CHAIRMAN. All we want is the gist of the matter.

Mr. DE GHEQUIER. We should have to import ammonia from the other side if this source of supply is cut off.

Senator STANFORD. What extent of country is fertilized by this fish?

Mr. DE GHEQUIER. The annual production of fertilizers now reaches about a million of tons. Outside of this source of supply there are imported from England from 60,000 to 80,000 tons in addition.

The CHAIRMAN. Upon what area of country is that million tons used?

Mr. DE GHEQUIER. That is spread all over the country. The Western States are beginning to use it now. California begins to develop manufactories there.

The CHAIRMAN. What do you call the manure?

Mr. DE GHEQUIER. It is an ammoniac superphosphate. It is sold under various names. There are two classes of fertilizers; one is simply phosphoric acid, bones, etc., treated with sulphuric acid, and made available, and the other is this same acid phosphate, supplied with ammonia, either in its direct form or with nitrogen, and then the potash salts which are imported from the other side.

The CHAIRMAN. What is considered an average weight for an acre?

Mr. DE GHEQUIER. At present they apply in this country about 200 pounds to the acre as an average, but the farmers begin to learn now that if they apply more it is better. There are farmers in Maryland who raised this last year by the application of 600 pounds of fertilizers 62 bushels to the acre.

The CHAIRMAN. What is the market price per ton of this ammonia?

Mr. DE GHEQUIER. The market price varies according to the value of the ingredients. Of course fertilizers that analyze very high command a higher price in the market.

The CHAIRMAN. Give us the maximum and the minimum.

Mr. DE GHEQUIER. One fertilizer has been sold in the market for $95 a ton. That was an imported one. The average fertilizer here analyzes about 8 per cent. of phosphate, 2 per cent. of ammonia, and from 1 to 2 per cent. of potash.

The CHAIRMAN. What is that worth?

Mr. DE GHEQUIER. That is worth from $30 to $36, cash price at the factory.

The CHAIRMAN. What is the minimum price?

Mr. DE GHEQUIER. Low-graded acid phosphates may be bought from $14 upwards.

Senator SEWELL. How many tons of the fish product go into the fertilizer?

Mr. DE GHEQUIER. About 30,000 dried fish, and certainly not less than that of scrap of wet fish.

Senator SEWELL. Forty-five thousand tons is mixed with a million tons of fertilizer?

Mr. DE GHEQUIER. Rather constitute a portion of it.

Senator SEWELL. What is the price of that scrap?

Mr. DE GHEQUIER. The scrap is worth sometimes as high as $2.50 to $3. It is sold entirely by analysis.

Senator SEWELL. Is it not sold by the ton?

Mr. DE GHEQUIER. By the ton, but only on the analysis basis. For instance, the manufacturer contracts to buy 200 tons, and to pay so much per unit on that quantity.

Senator ALDRICH. What proportion of the ammonia which is used in your fertilizers comes from the fish product; can you tell? What proportion of the whole amount used, I mean? Can you give any idea of that?

Mr. DE GHEQUIER. Thirty thousand tons in a million.

Senator ALDRICH. What proportion of the ammonia comes from the fish product that you use? You buy ammonia in other forms, I suppose.

Mr. DE GHEQUIER. Yes.

Senator ALDRICH. What proportion of the amount you use comes from the fish product?

Mr. DE GHEQUIER. I should say 50 per cent. of it; fully 50 per cent., because outside of the ammonia the fish scrap contains, of course, always a certain amount of phosphate of lime.

Senator ALDRICH. You manufacture about 1,000,000 tons?

Mr. DE GHEQUIER. Of fertilizer.

Senator ALDRICH. So that 500,000 tons of that represent the fish product. That is, the ammonia for it is furnished from the fish product?

Mr. DE GHEQUIER. The ammonia for about 500,000 tons of that is furnished by the fish.

Senator DAWES. Is that confined to menhaden, or does it include other kinds of fish?

Mr. DE GHEQUIER. To my knowledge there are no other kinds of fish for the purpose; that is the only one that is used for oil in the first place, and the refuse afterwards is used for fish scrap.

Senator DAWES. In what locality is the menhaden taken mostly?

Mr. DE GHEQUIER. I believe the fishermen are more competent to

answer that than myself. We have them in the Chesapeake and along the Atlantic coast.

Senator DAWES. Do you know anything about the habits of the fish?

Mr. DE GHEQUIER. Except what I understand that the menhaden is very strange in its habits. Since they passed the law in Maine prohibiting the fishing of menhaden, it has not been seen on the coast of Maine. [Laughter.] It seems to have abandoned localities where it is not allowed to be caught.

STATEMENT OF JOSEPH WHARTON.

Mr. JOSEPH WHARTON (of Philadelphia). I own land in the State of New Jersey. Some of the land is very poor in the State of New Jersey. There are a few oases. The main difficulty in prosecuting agriculture there is to get anything to fertilize the soil with; and I was advised to put up a menhaden factory on the shore for that purpose, which I did. I have been engaged in that for many years. I am fully persuaded that the whole region of New Jersey from the central line, where they get marl, out to the sea, will be very much endangered by the stoppage of the menhaden catching. The whole Atlantic coast, as the gentleman who has just spoken has given us to understand, depends upon artificial fertilizers. The western soil does not need them to any great extent; but the whole Atlantic coast depends upon artificial fertilizers, and as you have just heard one-half of the whole amount of those artificial fertilizers depends on the menhaden scrap, and the menhaden scrap is just so much clear gratuity taken by man from the sea.

The sea is constantly robbing the earth, as everybody knows. Its fragments pass down into the rivers, and from the rivers into the sea; and whatever little quantity of that man can regain in any way is certainly fair gain—proper for him to do. He is taking back a little from the hungry and greedy sea that is constantly devouring everything. Of all the forms in which fertilizers can be taken from the sea, and there are several, the kelp, for instance, on the English and Irish coasts, and some few other forms of fish fertilizers, dog fish on the coast of Maine, for instance, there is nothing comparable to the menhaden fishery. I suppose that all the other forms in which anything useful to the soil is taken from the sea do not amount to one-hundredth part of that which is taken by the menhaden fishery from the sea for the improvement of the land; and to destroy the menhaden fishery, which this bill would virtually do, because it is really in the nature of breaking up the entire business, would be to deprive the entire Atlantic coast of one-half of the resources which it now has for fertilizing, and the whole of that one-half which would be robbed from the Atlantic coast would be just that which comes for nothing. It is not the result of anything that is grown upon the land, but it is doubling the land somewhere else for the benefit of that part of the land which requires fertilizers, and it is a clear gain from the sea just as if it was taken from the air—an absolute clear gain to the soil of one-half of the entire amount of the artificial fertilizers which the whole Atlantic coast requires. The robbing of the farms of the whole Atlantic coast of one-half of their artificial fertilizers is so serious a matter that I can not think that the committee can consider this bill favorably, if they get that fact fairly impressed upon their minds.

There is no other point in which the agriculture of the Atlantic coast could be so seriously injured as by the stoppage of the menhaden industry. The damage that would be done to the persons engaged per-

sonally in the industry will be spoken of, no doubt, by some of those who are engaged in the fishery, but that is of less importance, in my judgment, than the damage to the farmers.

I could say more, but there are other gentlemen here waiting to speak, and I think I had better give them the opportunity.

The CHAIRMAN. You speak of this bill affecting the destruction of the menhaden fishery. Do you know the habits of the menhaden?

Mr. WHARTON. I know them in a general way.

The CHAIRMAN. Or the character of the menhaden fishery? This merely applies to fishing within 3 miles of land. Are not menhaden caught outside of that line?

Mr. WHARTON. They certainly are, but to capture menhaden you must go where the menhaden are. The menhaden are not quite so obliging as the gentleman who just now spoke would have us believe. They will not accept the invitation of men, but you have to go for them where they are. The habit of the menhaden fishers, as you will learn from some of the other gentlemen, is to follow the fish wherever they are found. The habit of the fish is to come to the coast. Where they come from is not clearly known, but they come upon the coast of the United States. They reach the coast probably somewhere about South Carolina, but they are never caught down there. Then they gradually and slowly travel up along the coast at variable distances from the shore, until they get up to the coast of Maine, or even farther, and there they halt awhile and turn down southward and go along the coast again, and they are caught during that northward and southward migration principally.

The CHAIRMAN. Do you know where they are reproduced—where they spawn?

Mr. WHARTON. No; I do not think anybody knows that; I am not competent to answer it, at all events; but to answer directly the question which this merely leads up to, the fish are sometimes close to shore, sometimes very abundant in the bays even, and sometimes far out to sea. I suppose there were never as many menhaden seen in a mass as those which Professor Baird, the head of the Fish Commission, mentioned in one of his reports. He said he saw in a single school of these fish—he sailed through them in the *Fish Hawk* a great many days, and he saw more in that one mass of fish which were noticed outside of what is ordinarily considered the fishing limit—out in the open sea there were more in that one mass of fish by perhaps a hundred fold than all that have ever been caught by man since the fishing of menhaden was first invented. The multitude of them is beyond computation. It is only a small fraction that come along the coast, but to deprive the fishermen of the opportunity of catching fish within 3 miles of the shore would in a great many instances entirely destroy the day's work or the week's work. They have to catch the fish where they happen to find them, and to establish an arbitrary line within which the fish shall not be caught would interfere with the business, and make it unprofitable to that extent that it would be better to quit the business altogether. It is a precarious business, the profit of it is very slender, and anything that would tend seriously to diminish the little profit would simply destroy it. The experience of the fishermen for the last two years or more, I think, has been a general loss. They have lost money instead of gaining. Last year I think that was universal.

Senator DAWES. What is the interest that is benefited by the bill?

Mr. WHARTON. I think that is as the gentleman who has just spoken has expressed it, a matter of the amateur fisherman along the coast

more than anything else. People go from the cities to the seashore, and they like to go out in a little boat, cast a line over the side, and catch a fish or two. They take a little of Mrs. Winslow's soothing sirup along with them and get their noses red and their faces sunburnt, and they can do that without catching fish as well as with.

Senator DAWES. Is there any industry affected?

Mr. WHARTON. None.

Senator DAWES. Is any invested capital affected?

Mr. WHARTON. There is a very slight industry of catching fish by hook and line for the market, but that is really quite insignificant. The chief part of the food fish caught for market are not caught by hook and line.

Senator DAWES. These are not used for food directly?

Mr. WHARTON. They can be used. I have eaten menhaden and found them good, but they are too bony. One name of the menhaden is bony. They are thought to be too bony for food.

The industries that are supposed to be promoted by this bill I should like to hear some of the advocates of the bill speak for. I have not been able to discover any important interest or industry that desires the passage of the bill.

Senator SEWELL. You see no industry connected with the bill itself? Do you call the employment of several thousand people, who live on hook-and-line fishing and supply the market of New Jersey, no industry?

Mr. WHARTON. I should like first to be satisfied that there are several thousand Jerseymen depending on the hook-and-line industry for their livelihood. I have been along the Jersey coast a great deal.

Senator SEWELL. From the Delaware to the Sandy Hook there are.

Mr. WHARTON. You may be better informed upon that, but I think it a matter of some doubt as to that coast. I should think a very few hundred would embrace the whole of them, and even many of those depend on other things. They only practice fishing for part of the year.

Senator SEWELL. How many men are employed in the menhaden fisheries in New Jersey?

Mr. WHARTON. I would rather refer that to some of the other gentlemen who are more competent to speak.

Senator ALDRICH. Do I understand you to admit that the catching of menhaden does interfere with these people at all, or is it a matter of fancy?

Mr. WHARTON. I do not believe it interferes with them in the least. I think that is altogether a notion and a fancy. I do not like to refer to a gentleman who is not present, Professor Baird; I wish he was here. One of the things he said was that the destruction of menhaden by other fish is so infinitely beyond anything man can do in the way of destroying menhaden that what man does is utterly insignificant. That I thoroughly believe.

STATEMENT OF E. G. BLACKFORD.

Mr. EUGENE G. BLACKFORD (of New York). Mr. Chairman, I do not appear here as a mendaden fisherman, or in the interest of menhaden fishermen at all, nor in the interest of any of the parties affected. As commissioner of fisheries of the State of New York I have paid considerable attention to all matters pertaining to fish, especially sea fish, and I had the honor of assisting the Senate committee a few years ago in its investigations along the coast in the vicinity of New York. At one time I became strongly imbued in favor of the necessity of legislation for the protection of the sea fisheries.

I thought that this enormous catch of fish that was taken every year by menhaden steamers and mackerel vessels would certainly tend to deplete the ocean of valuable food fishes; and some two years ago I, as a member of the American Fisheries Society, meeting here in Washington annually, was asked to prepare a paper, and I started to prepare a paper in favor of legislation for the protection of sea fisheries. Not being much of a writer or speaker, it was a matter of considerable labor for me, and I went to work to get together my facts from my own diaries that I kept of the daily supplies of the markets, and of the prices and notes that I take of the large catches, in order to prepare this paper to be read; but when I got my material all together I found the facts were entirely opposite to the views which I had entertained, and the more I looked into the subject the more I became impressed that there was no necessity for legislation for the protection of any of the free-swimming ocean sea fishes.

I mention that particularly because I do not wish to be understood as not favoring protection of the fish that go into the fresh waters to spawn; but as to fish that spawn upon the ocean and do not go into rivers and streams to spawn I believe nature has provided for such an immense amount of reproduction that men can not, with all the million contrivances for catching fish, have any appreciable effect upon the total amount of fish in the sea. This view, as I said, I came to from examining into the facts, although I had started in favor of protective legislation, and I think that you yourselves, if you would give this matter careful investigation of the statistics that may be attainable with regard to, for instance, the mackerel fishery, of which we have figures going back a hundred years or more, and for codfish and other sea fishes, will find that notwithstanding the immense catch and large consumption of these fish, both for food and for other purposes, these same fish in our markets to-day are just as plenty and just as cheap, and I think somewhat cheaper because of the increased facilities for catching them.

I have understood that there has been a bill already reported to the House of Representatives restricting the catch of mackerel. Gentlemen in its favor argue, I suppose, on the same basis that they do for the restriction of the catch of menhaden, that it has a tendency to impair the quantity or quality of the supply for food. With regard to that particular fishery let me give you just one instance, a year ago, if it is not foreign to the subject to speak of the mackerel.

The CHAIRMAN. No, sir.

Mr. BLACKFORD. About the 1st of April the mackerel fleet struck an immense school of fresh mackerel, and they all loaded up and came into New York, and there was at one time upwards of 15,000,000 mackerel lying around the wharves in the vicinity of Fulton Market. Those mackerel were unloaded there just as fast as possible. Men, women, and children came from all parts of the city with baskets, and the wagons of licensed venders, and there was no question about the price. They gave a basketful for 5 or 10 cents, and would load a man's wagon for 25 cents. For the space of two or three weeks the poorer classes had the benefit of this immense catch of mackerel. They were distributed all through the city. Of course it was the means of a large class of people making money; not myself, although I am in the fish business. This glut of fish interfered with my business, so to speak, but for the people generally it was a great blessing, especially for the poorer class.

That single fact of itself in regard to the mackerel fishery is conclusive. That fishery has been prosecuted with all the perseverance

and ingenuity and enterprise that the fishermen of our coast are capable of for one hundred years, and yet there is this enormous take, which goes to prove that man as a factor is of no account in depleting the waters of the ocean.

The CHAIRMAN. Permit me to interrupt you. What was the reason of their giving away that immense amount of mackerel; could they not have been salted?

Mr. BLACKFORD. A large portion of those were salted, but at that season of the year the mackerel are inferior in fatness, the quality is not of the kind that makes them most desirable for salting, but a very large portion of that catch was salted and sold salted at a very low price, sold in the salted state for from $2.50 to $4 per barrel. I should like very much to read a short paper I wrote in connection with this, to have it incorporated into your minutes as my views with regard to it. It will take about seven or eight minutes to read.

The CHAIRMAN. Can you submit it and have it incorporated just as well?

Senator DAWES. Have you several copies?

Mr. BLACKFORD. I have copies of it. I can send you some.

Senator DAWES. Suppose you send each member of the committee one.

Mr. BLACKFORD. I will do so.

Senator SEWELL. You have said to the committee that you do not think fishing for menhaden depletes the food fish along the coast. Are your remarks principally directed to deep sea fishing?

Mr. BLACKFORD. Yes, sir; that is, to what are called free swimmers, the free ocean fish.

Senator SEWELL. Has not the take of fish on the New Jersey inland waters been very much decreased in the last few years?

Mr. BLACKFORD. I can not say that it has from my observation.

Senator SEWELL. The people engaged in the menhaden fishery deny ever taking any food fishes. My recollection is that when you spoke before a committee of the Senate a few years ago you gave an account of some very large diminution of food fishes by the menhaden fishermen and selling them in the Fulton Market.

Mr. BLACKFORD. That is a fact. They did make very large catches of weakfish, and they steamed direct to Fulton Market, and we had just such a time of cheap fish in New York as I have before described, owing to that catch.

Senator SEWELL. Is it not customary for them to take anything within their reach?

Mr. BLACKFORD. I can not say from actual observation. From facts coming under my own observation in connection with the marketing of fish, I know that should they be able to catch large schools of bluefish, weakfish, Spanish mackerel, or any of the other valuable food fishes, it would pay them very much better to bring them to Fulton Market and sell them for food than it would to take them to the factories; it would bring them more money, and consequently their interest would be to market them. I know it has been alleged that they do catch a very large amount of food fish which is turned into oil and scrap, *but so far as my knowledge goes*, and I meet a great many of the fishermen and others connected with it, I have never found anything to confirm the idea or to prove that they did catch any considerable number of food fishes and use them for oil or scrap.

Senator SEWELL. Do you know anything about the proportion of fish that is caught within the proposed 3-mile limit of the coast, or do you confine your statement to the outside?

Mr. BLACKFORD. With regard to the catching of menhaden, I do not. I am not sufficiently well informed in the practical workings of menhaden fisheries to say whether the 3-mile limit would prohibit and destroy their fishery or not. There are others, of course, who are more familiar.

Senator SEWELL. Have you any knowledge of the habits of the fish, so as to be able to give the committee an idea of whether the hauling of these purse nets on the bottom of the shore within the 3-mile limit is or is not destructive of the feeding grounds of the fish? Take the sheepshead, for instance. They have a certain feeding ground. If you haul a deep net over it, dragging the ground, does it not interfere with them?

Mr. BLACKFORD. If I understand the method of the menhaden fishermen rightly, they do not really scrape the ground; they have a leaded line which goes to the bottom of the seine to keep the seine extended down, but I do not think they ever scrape the bottom of the sea.

Senator SEWELL. That depends altogether on the depth of the water where they are hauling.

Mr. BLACKFORD. Of course the sheepshead feed on muscles and small crustacea. For two years I made a series of investigations into the food of our principal food fishes, what they went for. For instance, they strike the bass and the bluefish. I employed a man to take a certain number of fish out of the market every day, open their stomachs, and examine them, and the only fish we have found who feed to any extent upon the menhaden are bluefish and striped bass, and the striped bass, particularly on the coast of North Carolina, seem to have a larger proportion of menhaden in them than the bass that we get farther east. It was rarely, if ever, we got menhaden out of the stomach of striped bass that was caught north of Sandy Hook.

Senator DAWES. You say you are a dealer in fish?

Mr. BLACKFORD. Yes, sir.

Senator DAWES. Do you deal in menhaden?

Mr. BLACKFORD. No, sir; not at all.

Senator DAWES. You deal in food fish?

Mr. BLACKFORD. In food fish.

Senator DAWES. So that anything that tends to furnish to you food fish cheaply would be for your interest, would it not?

Mr. BLACKFORD. Yes, sir.

Senator DAWES. If the taking of menhaden destroyed, directly or indirectly, the supply of food fish for you it would be against your interest, would it not?

Mr. BLACKFORD. Entirely so, sir. Anything that tends to make any of our food fishes scarce is an injury to my personal business.

Senator DAWES. What is the official position which you hold?

Mr. BLACKFORD. Commissioner of fisheries for the State of New York. I am one of four commissioners.

Senator DAWES. How long have you held that position?

Mr. BLACKFORD. Seven years.

Senator STANFORD. Are the pastures of the menhaden in the open ocean?

Mr. BLACKFORD. I should suppose that most of their food was found on the ocean, not particularly confined to the shores, but extending out probably to a considerable distance. So far as our investigations have proved the matter, we find that they feed upon minute jelly fish. They do not seem to eat anything of any size. We find a little, small, black

crustacea occasionally in their stomachs, but their principal food appears to be a small jelly fish, which sometimes will cover the water of the ocean for miles.

Senator STANFORD. Where do they spawn?

Mr. BLACKFORD. That is a fact which has never been demonstrated beyond question; we only arrive at it by inference. I think I testified before the Senate committee when it met in the vicinity of New York to the fact of finding small menhaden, about three-fourths of an inch to an inch long, in the waters of the Great South Bay. I think they were taken in the latter part of June. I should judge from the knowledge of the growth of fishes, they might possibly have been from six weeks to two months old, showing that the fish might have spawned in the month of May. They certainly must have spawned in that vicinity, for the young fish could not have traveled any great distance. Still, at the same time, the number of fish found is so small in comparison with what we ought to find when we know their spawning beds, that it does not prove the habits of the fish entirely. The finding of these young menhaden was an exceptional circumstance, and went to prove that they had been spawned within six weeks or two months in the vicinity of the waters of the Great South Bay on the south side of Long Island.

Senator STANFORD. You really have no evidence whether they spawn in deep or shallow water?

Mr. BLACKFORD. No, sir; we have not.

Senator DAWES. State that again.

Mr. BLACKFORD. As a rule, we do not know, we have no positive evidence, as to their general habit of spawning. The circumstance which I spoke of was an exceptional one of finding these young menhaden.

Senator DAWES. I understood Senator Stanford to inquire whether you were satisfied that they spawned in deep or shallow water.

Mr. BLACKFORD. We are not satisfied as to which they do spawn in, whether it is in deep or shallow water.

The CHAIRMAN. You speak of ocean-spawning fish?

Mr. BLACKFORD. Yes, sir.

The CHAIRMAN. What is the other distinction that you apply?

Mr. BLACKFORD. What are termed anadromous fish, fish that run up into the rivers from the ocean and find fresh water, where they spawn; for example, the shad and the salmon are the most notable examples of that kind, and the smelt also.

The CHAIRMAN. What are the ocean-spawning fish?

Mr. BLACKFORD. Codfish, bluefish, and eels are ocean spawners to a large extent.

The CHAIRMAN. By that do you mean that they spawn along the shores or out at sea?

Mr. BLACKFORD. There is no doubt that a very large number spawn at sea, in fact that the bulk of them spawn in the ocean and not along the shore.

The CHAIRMAN. You also said that from the character of facts which had come to your knowledge you were satisfied that all the fishing done by men did not affect the supply.

Mr. BLACKFORD. Of these particular fish known as ocean-spawning fish.

The CHAIRMAN. Does that apply to all fish?

Mr. BLACKFORD. All fish that are termed ocean-spawning fish, menhaden, bluefish, striped bass, and codfish particularly.

Senator STANFORD. The pasture ground of the fish that run up the rivers is limited.

Mr. BLACKFORD. Ocean fish, when coming into rivers to spawn, very seldom feed after getting a short distance up the river. For instance, a salmon when it enters a river has its stomach full and distended with food, and as it gets nearer to the spawning bed it becomes more and more cleaned out, and finally when you open a salmon that has arrived at the spawning bed you find the stomach entirely empty—no food at all.

The CHAIRMAN. How would this bill affect the interest of those men who follow fishing for a livelihood?

Mr. BLACKFORD. You mean the food fishermen, the men who fish for food fish for a living?

The CHAIRMAN. Yes.

Mr. BLACKFORD. From my own observation I can not see that the menhaden fishermen have affected the supply of food fish on our coast. I do not know but that the circumstance has already been stated to the committee—it is a matter which has been published by the United States Fish Commission—that in 1764 the bluefish disappeared entirely from our coast and were gone for several years. That was previous to any menhaden fishing or the catching of fish on any extensive scale, whether mackerel, menhaden, or others. The habits of sea fishes are governed by certain natural laws; there is no doubt that they are not influenced by man and can not be calculated upon, and their movements are erratic according to those unknown laws. For instance, bluefish a year ago this last summer were wonderfully abundant all along the Jersey coast; our market was glutted with them, and the price went down to 2 cents a pound. If they had not been taken off the market and refrigerated they would have sold for a cent a pound. They were very abundant. Last summer, on the contrary, they were very scarce, but the fishermen all reported that the bluefish were very abundant away off shore, but they would not take the hook and line, and they were off under such circumstances in deep water that the men could not use the nets. So the bluefish were not scarce last summer to the fishermen along the coast, because the fish itself was scarce, but because they did not go into the shore. They were all off at sea.

Senator DAWES. Could that be attributed to the fact that the fishermen had taken their food off in the shape of menhaden?

Mr. BLACKFORD. No, sir; for the very reason that the year before this the menhaden fishermen were prosecuting their industry with the same perseverance that they have for the last ten years and the bluefish were plenty the year before.

Senator DAWES. Is this law of the fish that you do not quite understand what makes the change of fishing grounds?

Mr. BLACKFORD. There are certain conditions probably of temperature more than anything else—the temperature of the water—that govern the movements of these large schools of fish. We have already ascertained that the temperature does affect the movements of shad. A few degrees rise in the temperature will bring the shad in larger quantities, and a few degrees fall of temperature will stop them. We think there is no doubt that more or less applies to all fishes, but still we have not facts to prove it in regard to them as we have in regard to shad.

Senator DAWES. Allow me to make an inquiry in reference to this bill; you know so much about fishes and I so little. This bill confines its operations to within 3 miles of the coast, and also within portions of the 3 miles that are not within the jurisdiction of any State. If the prohibition is within 3 miles and still it is only in such portions of the 3

miles as are not within the jurisdiction of any State, can you tell me what that would affect? What portion of the 3 miles bordering on any State is outside of the concurrent jurisdiction of the State and the United States?

Mr. BLACKFORD. As I understand it, for instance you take a very large open bay on the coast. If a line is drawn from the headland here to the headland there [illustrating], inside of that line is within the jurisdiction of the State, while outside of that line to the extent of 3 miles is under the jurisdiction of the United States.

Senator DAWES. Can you think of any other application of it?

Mr. BLACKFORD. That is the only one I recall at the present time. So far as this provision would affect the menhaden fishermen, to destroy or remove their fishery beyond the 3-mile limit, I am not qualified to speak practically. That is a matter on which they can inform you better than I can.

Mr. D. T. CHURCH. Mr. Blackford, I wish you to state something about the spawning of the menhaden. What was the tendency of the evidence that you found in relation to the spawning? Do they not spawn late in the fall?

Mr. BLACKFORD. So far as I can recollect, without having the notes before me, we found the fish largest with spawn along in October and November. The fish that were caught early seemed to be entirely stripped as though they had just recovered from the act of spawning. The fish that were caught very late had all of the appearance of approaching ripeness. We never yet have had any menhaden that showed the spawn actually ready for spawning, but later in the season, and I think it was in the latter part of October or possibly the first of November, we found the specimens of menhaden that were sent to us very large with spawn. We had some sent to us from eastern waters in the vicinity of Rhode Island or Massachusetts that showed that, and we also had some from the coast of North Carolina that showed the same indications of the approach of the spawning season.

Senator DAWES. That was in the fall?

Mr. BLACKFORD. Very late in the fall.

Senator DAWES. Do you infer from that that they spawn in the winter.

Mr. BLACKFORD. No, sir. I think possibly that the fish spawn very early in the spring.

Mr. DE GHEQUIER. They are in that condition when they are going south.

Mr. BLACKFORD. They are in that condition when heading south. I am not entirely convinced that all these schools of fish that we speak of coming along the coast from south to north and then turning and going back actually do so. I think large numbers of fish that we think do that go off into deeper water. We know that shad do not go south. We know that shad lie off in the ocean close to the mouths of rivers.

Senator DAWES. Do you infer from the condition of these fish that they are seeking in the fall their spawning home?

Mr. BLACKFORD. Yes, sir; I do. That would be the natural inference from what we know of the habits of the spawning fish; that when a fish is so large with spawn, whatever direction it may be heading, then, of course, it must be towards the grounds where its instincts take it for the reproductive process.

Senator DAWES. And they are never headed inshore in that condition?

Mr. BLACKFORD. That I am not qualified to speak of, not having seen the fish.

The paper referred to by Mr. Blackford is as follows:

Is legislation necessary for the protection of the ocean fisheries?

[By Eugene G. Blackford, Commissioner of Fisheries, State of New York.]

One of the questions that frequently perplexes the mind of the fish culturist and the legislator is, how to protect in the best manner the valuable food fisheries of the seacoast and ocean.

On the one hand, there are the market fishermen, who use sailing vessels and work either in the deep outside waters, or, with net and hook, gather their prey along the shores and in the bays of our coast. This industry gives employment to over eighty-five thousand men and a capital of over $30,000,000.

On the other hand, we have the large fleet of steamers that patrol the ocean catching the menhaden, and from them manufacture oil and fertilizers, an occupation involving nearly $3,000,000 and giving employment to over two thousand men. These facts give some idea of the magnitude of the interests involved and of the importance of the question under discussion.

For the last five years a large number of the former class of fishermen have claimed that the steamers seriously affected their business, stating that many kinds of fish that were formerly abundant are now scarce, and that, unless laws are passed prohibiting the menhaden steamers from fishing within 3 miles of the shore, or in some way restricting their operations, many kinds of the valuable fishes will be exterminated or driven from our shores. In pursuance of this idea they have petitioned both State and national legislatures to that effect.

The question has been largely discussed by the press, the State and National fish commissions, and in the United States Senate. The latter has appointed a Committee on Fisheries, with Hon. E. G. Lapham as chairman. This committee has for the past two years taken the testimony of all classes of fishermen, and obtained the views and theories of fish culturists and ichthyologists. And, in addition to this, we have the valuable information and statistics gathered with great care by Prof. S. F. Baird, the eminent Commissioner of Fish and Fisheries of the United States.

It has been my privilege to assist in obtaining information on the subject for the Senate committee, the United States Fish Commission, and the New York State fishery commission, and I have read with great interest all of the evidence that has been taken by them bearing on this subject. And now, in discussing the question as to the advisability of any legislation to protect the ocean or sea fisheries, it is best to look over the facts which have thus far been brought out and see what would be the best way to provide for the continuance of the abundant supply that we now enjoy.

The first thing that we want to ascertain is whether what we know as salt-water fish, are scarcer now than in former times, and I would say here, that the absence of statistics covering any considerable space of time makes an answer to this question somewhat difficult, but, thanks to the New York Fishmongers' Association, and to the Boston fish bureau, a beginning has been made to supply this hiatus, and it is hoped that the National Government will very soon take definite measures for the purpose of getting, annually, correct statistics of the amount of fish caught in the waters and on the coast of the United States. Having been a dealer in fresh fish in Fulton Market, New York, for the past seventeen years, I have had the opportunity of noticing during this period the varying supply of various kinds of fish, and I beg leave to submit my views as to the scarcity or plentifulness of these various species.

First and most important of all our fishes is the cod. I believe that there has been no considerable diminution in quantity in the last decade, judging from the quantity brought to market and the prices obtained; and as some indication of the range of price, I may say that during the year 1883 cod sold as low as $1 per hundred weight. In some years there has been a perceptible decrease in the catch, but it has been followed by such enormous catches that the markets have been glutted. The statistics of the Boston fish bureau show the catch of the New England fleet to be: For 1881, 775,027 quintals; for 1882, 898,904 quintals; for 1883, 1,061,698 quintals, showing an absolute increase in two years of nearly 300,000 quintals. Surely these figures need not occasion any alarm or fear that codfish cakes will be beyond the reach of the most impecunious fish culturist.

Next, and hardly second in importance, is the bluefish. It is a matter of historical record that these fish disappeared entirely from our coast in the year 1764, and did not make their appearance again for several years, and then they were taken in vast numbers. Suppose such a disappearance should take place this summer. How quickly the fishermen would appeal to the legislatures to abolish the menhaden steamers, and the angler would cry out for the destruction of the pound and trap nets. Each would probably claim that the scarcity was owing to these instrumen-

talities. This one instance of the bluefish in 1764 should lead us to be careful and conservative in regard to legislation, and to carefully consider whether there are not some great natural laws that determine the appearance and disappearance of fish on our coast, rather than attribute it to the comparatively puny efforts of man to affect the supply.

But let us turn to the question as to their present apparent scarcity or plentifulness. During the year 1882 bluefish were scarcer than they had been for some years, and the wholesale price did not go below 5 cents. This scarcity was particularly noticeable on the New Jersey coast. But the season of 1883 was unusually productive, and bluefish sold as low as 2½ cents per pound, and, had it not been for the large quantities that were taken out of the market and stored in refrigerators for winter use, the price would have declined to 1 cent per pound.

It would seem to be a fair inference that the bluefish needs no protection at present.

The fresh mackerel is another important factor in the food supply of the people. It has attracted a great deal of the attention of fish economists, and it is one of the fishes in regard to which, through the statistics of the Boston fish bureau, we can speak somewhat intelligently.

In 1825 the New England catch was 260,000 barrels; in 1826, 160,000 barrels; in 1827, 200,000 barrels; in 1828, 240,000 barrels, and in 1831, the largest quantity on record was taken, amounting to 390,000 barrels. After this wonderful catch the number steadily declined until the year 1840, during which season only 55,000 barrels were taken. In 1851 there was another wonderful catch of 330,000 barrels; in 1859, only 100,000 barrels; in 1863, 310,000 barrels; in 1868, 180,000 barrels; in 1870, 320,000 barrels; in 1877, 110,000 barrels; in 1880, 245,000 barrels; in 1881 and 1882 the number is the same, 260,000 barrels; in 1883, 160,000 barrels. These figures, covering a period of fifty-eight years, would seem to indicate that their plentifulness or scarcity is not governed materially by the purse seines of the Gloucester fleet.

In my own experience in the New York markets I have just seen such fluctuations in the quantities brought to that city, and whenever there occurs a bad season the fishermen and others interested talk of the probability of the mackerel being all caught up, and of the necessity of some protection for the mackerel fisheries.

The opening of the present season has been a remarkable one. The first vessel arrived March 24, and the mackerel were so small that the captain refused to take off his hatches to show the fish, and insisted on selling them "unsight unseen," and he was fortunate enough to find a purchaser on those terms at 2½ cents each. There were something like 100,000 fish in the load, and they were so small that it took five of them to weigh a pound. The firm that bought them succeeded in selling a few hundred at 4 cents each, and then the price rapidly declined, until the larger portion of the cargo was sold at 50 cents per hundred. About that time the unfortunate buyer called my attention to the fact that it was a great shame that such small mackerel were caught, and that Congress ought to pass a law to prohibit such a wicked waste.

The first load of mackerel was followed by several loads with fish a very little larger in size, but about the 20th of April a new school made its appearance, the average weight of the fish being about 1 pound each, and at least 1,500,000 of this size have, up to the present time, been marketed, and a large portion of them have been sold as low as 2 cents each.

The porgy, or, as it is sometimes called, the scup, is another important fish that furnishes abundant and cheap food, and about which considerable controversy has been had during the past few years, between the net men on one side and the hook-and-line men on the other, the latter claiming that the pounds and traps of the former were exterminating these fish, and efforts were put forth to have laws enacted that should restrict or abolish pound and trap fishing. But nothing came of such endeavors. This was in 1871, and fishing has been carried on in the same manner ever since, and in the New York market last week porgies sold as low as 75 cents per barrel, or about one-half a cent per pound.

I might continue on through the list of food fishes, and occupy your time, and possibly your attention, but I think I have said enough on this branch of the question.

Now, let us consider the menhaden fisheries, against which is brought the charge that they are prosecuted to such an extent, by both sail and steam vessels, that they have materially decreased the numbers of menhaden and seriously impaired the catch of food fishes. You will find, by referring to the reports of the United States Menhaden Oil and Guano Association, that in 1875, with 283 sailing vessels and 25 steamers, 492,878,000 fish were taken; that in 1881, with 286 sailing vessels and 73 steamers, 454,192,000 fish were caught; and in 1882, with 83 steamers and 212 sailing vessels, only 346,638,000 were caught, and last year, 1883, with 136 sail and 69 steamers, there was the enormous catch of 613,461,000 fish. These figures, taken in connection with the statements that have been made to me by captains of merchant vessels, and fishing smacks, that during the fall of 1883 they sailed through miles of menhaden, would warrant the belief that this fish is very far from being exterminated, and that,

with them as with the food fishes that are taken for market, there are seasons of great abundance and seasons of scarcity, and that up to the present time these seasons have not been affected, either one way or the other, by human agency.

Another significant fact is, that during the early part of the menhaden season of 1883, and up to nearly its close, the fishing was so poor and unprofitable that the fishermen themselves began to think they had "killed the goose that laid the golden egg," when all at once the fish appeared in countless numbers, and in a few days they had taken enough to turn what had promised to be a most disastrous season into one of large profit to all concerned.

Now, having presented these facts to you in a crude and disjointed form, permit me to say, in closing, that although what are known as the hook-and-line fishermen, almost without exception, testify (and I believe truly) that they find their occupation and means of living seriously impaired; yet from my experience and observation in the markets, I believe the facts to be that, with the exception of striped bass and lobsters, all kinds of sea food fishes are as abundant now as they were fifteen years ago; and believing this, I am forced to the conviction that any legislation looking to the restriction of the fishing by the menhaden fishermen is unnecessary, and that any laws prohibiting pound and trap net fishing would cut off a large proportion of abundant and cheap food for the people, and nothing would be gained.

But I do hope that Congress will take some action that will provide for the collection of statistics as to the quantities of fish taken, so that in future, when questions affecting these vast industries come before them, they will then be able to frame legislation that will protect the fisheries and not oppress the fishermen.

Mr. ENDICOTT. I would like to ask Mr. Blackford to state whether in his opinion the pollution of the waters by gases and oils has a detrimental effect upon the fisheries.

Mr. BLACKFORD. That is a question which, I believe, received some attention at the last meeting of the association in the Cooper Institute, New York. On that occasion some action was taken, which looked towards a petition for legislation to prevent the pollution of the water. I think it was admitted by all that it had been a source of great detriment to the fishing in our bays, and especially in New York Harbor. I will quote from the report of the association for 1883, page 75:

"Mr. BENKARD. I would like to bring up the subject of the pollution of our waters, which brings many of our fish cultural efforts to naught. I would respectfully offer the following:

"Whereas it is the sense of this association that the continual and increasing pollution of the waters of New York Bay from the refuse of certain factories threatens eventually to kill or drive away all fish, shellfish, and bivalves natural to said waters: Therefore—

"*Be it resolved*, That this association beg to call the immediate attention of the fish commissioners of the States of New York and New Jersey, also of the members of their legislatures, to this impending calamity."

I seconded that resolution and made a few remarks to the effect that a great many fish, which had formerly been abundant in the bay, were no longer to be found there. Striped bass, and particularly lobsters, had been driven out entirely. These latter used to be taken abundantly on the Jersey flats. Shrimps, too, which were very numerous and formed food for larger fish, were almost exterminated, and what few remained were tainted with a flavor of kerosene. Oysters and clams have been killed by thousands in the vicinity of Rockaway. The water has been so polluted by the factories of Barren Island as to render a number of oyster beds, that used to be considered valuable, of no importance whatever. I think, though I am not certain, that the New Jersey legislature has taken some action, and I am of the decided opinion that if our association moved in the matter, legislation could be brought about which would be able to control this matter at least in our own State of New York.

MEMORIAL SUBMITTED BY J. BOOKER.

JOHN BOOKER (of Hampton, Va.). Mr. Chairman, I am charged with the duty of presenting to you the petition of James S. Darling, of Hampton, Va., who is engaged in the menhaden fishery. I will read it:

To the honorable members of the Senate and House of Representatives of the United States of America in Congress assembled:

The petition of James S. Darling respectfully represents that he is a citizen of the town of Hampton, county of Elizabeth City, State of Virginia; that he is at present, and has been for the last eight years, engaged in the taking and catching of the menhaden fish, for the purpose of manufacturing the same into oil and fish-guano; that

his place of business, consisting of factories, drying floors, storage houses, quarters for hands, boats, tackles, nets, etc., is located on a barren sand hill, never before used for any other purpose, at the mouth of Back River, on the Chesapeake Bay, in said county and state; that he has expended in and about the erection of said buildings and apparatus a large sum of money, to wit, the sum of $45,000; that the said property is utterly useless for any other business or purpose than that for which it is now being used, and, if forced upon the market, your petitioner would hardly realize from the sales of the same the sum of $1,000; in truth and in fact it would be almost worthless.

Your petitioner further showeth that he employs in carrying on said business one hundred and sixty-five hands, all of whom have been trained to this business, and whose families are entirely dependent upon this enterprise for a livelihood.

Your petitioner further showeth that he expends annually in cash, in the county of Elizabeth City, from $40,000 to $50,000, by which said expenditures many of the poorer classes are greatly benefited.

Your petitioner now shows that there is pending before the Senate of the United States a bill known as "Senate bill No. 227," having for its object the protection of fisheries on the Atlantic (a copy of which is herewith filed).

Your petitioner further shows that should said bill become a law, owing to the nature of said business, the same being always situated in isolated spots, that his said property would be entirely worthless; in fact and in truth the passage of such a bill would be virtually to confiscate the entire property of your petitioner, and leave him, after eight years of hard work, almost destitute; that one hundred and sixty-five citizens of his county will be thrown out of employment, who are entirely unfitted for any other occupation, and that women and children will be left in a destitute condition.

Your petitioner is advised that the passage of the said act, proposing, as it does, to legislate upon the subject of fisheries in waters lying within the jurisdiction of the States, is unconstitutional.

Wherefore your petitioner prays, first, that the said bill may not become a law. But should Congress, in its infinite wisdom, see fit to pass such a law, that they, at least, make provisions in said act for the payment of such property as would virtually, under the provisions of said bill, be confiscated.

And your petitioner will ever pray, etc.

J. S. DARLING.

Senator DAWES. Where does the petitioner reside?

Mr. BOOKER. He resides at Hampton, in the State of Virginia, on the Chesapeake Bay. There are a great many factories that come under that same head.

STATEMENT OF D. T. CHURCH.

D. T. CHURCH (of Tiverton, R. I.). Mr. Chairman, as I come here as the representative of the menhaden interest, I suppose I may now say a few words as to what we are capable of proving in relation to this question.

In the first place, we start with the statement that we are not in any sense an enemy to a food fisherman; that our taking of menhaden does not have any effect whatever on the fishing for food fishes, and there is not a particle of evidence to that effect and never has been. It never can be produced to show that we affect in any way the taking of food fish on this coast. We are prepared to prove that. We will take as an illustration any fish that you may mention on the southern coast of New England, whether it is a codfish, a mackerel, a bluefish, a tautog, or any other fish. We have the evidence, and can give it to you square and straight if you want it, for the evidence is within our reach.

Senator DAWES. Do you mean that none of these fish feed on the menhaden?

Mr. D. T. CHURCH. No; what I mean to say is this, in short, that the appearance and disappearance of fish, whether it is a menhaden, a scup, a codfish, a mackerel, or a bluefish, anything of that kind is from natural causes, and that man has nothing whatever to

do with it. We can give you information showing that there is no fish, whether the codfish, the mackerel, or any of the varieties I have mentioned, but what has come and gone within the last forty years, two or three times. We can produce evidence to show there are fish that have made their appearance and lived on this coast for years and then have disappeared entirely, and not one been seen for twenty years.

In connection with this I will call your attention to one fact, which I think should settle the whole affair. This question was under discussion some years ago, and the people on the New England coast and on the New Jersey coast and down in Virginia were very much stirred up about it. About 1876, Mr. Dawes, if I remember aright, was the man who, in connection with that controversy, introduced a measure here appointing the United States Fish Commission to investigate the subject. After mature investigation by a set of men appointed by the Government of the the United States to settle this question that has been agitating the country for the last fifteen or twenty or twenty-five years, it has been conclusively determined, and the figures given to show, that man is not an enemy to a salt-water fish. Take the bluefish, for instance; they destroy all food fish that they can. Mr. Baird says that the bluefish alone in one year destroy 150,000,000 tons of fish, and he gives that as a low estimate. The menhaden fishermen, by the figures, for the last ten or fifteen years have taken 200,000 tons a year of these fish, which is in the proportion of 1 fish in 750. Instead of going into any extended defense, we produce this one fact, that the United States Fish Commission, which the Government of the United States has spent two or three million dollars upon to settle this question, make the statement that as to destroying fish the bluefish alone destroy 750 where we destroy 1.

The CHAIRMAN. Is that statement in regard to the bluefish general, or does it merely apply to our coast?

Mr. D. T. CHURCH. It applies to our coast within Professor Baird's observation; it applies to the coast that he goes on. Now, take another fish, which is the scup in New England, to give you a short history, and give you the point of just where this argument comes. The scup by history of the country was coeval with the whites coming into New England, in Massachusetts and Rhode Island. Massasoit, the Indian, entertained the first white man the Indian met by feeding him on a scup or porgy. When your father and my father, the old standbys, came on deck there was not a scup known in our waters. Before the year 1800 they were gone before there was ever a trap or a purse net set in the United States or thought of. The scup disappeared from the waters of New England. When Thomas Jefferson was elected President in 1800 the scup again made their appearance and were called the Jefferson fish for that reason—Democratic fish, because they came in in the year 1800. From the year 1800 to 1867 everybody could catch just as many scup as he chose at any place in Narragansett Bay.

Senator DAWES. You mean up to 1861.

Mr. D. T. CHURCH. In 1867 it was when the scup disappeared again.

Senator DAWES. I thought it was when the Democratic party disappeared. (Laughter.)

Mr. D. T. CHURCH. The scup, as I say, by 1867, had begun to grow scarce. Before that time anybody could catch a scup where he saw fit. You could go to into Narragansett Bay, put your line and hook overboard, and catch plenty of them. In 1867 the scup began to grow scarce, and by 1870 they were gone. Then these came in and then

arose the contest which was the foundation of the United States Fish Commission. An application was made to the legislature of Rhode Island to pass a bill, and Spencer F. Baird was one of the parties who drew the provisions of the bill. It was confiscation without judge or jury. I was in the business then; had my gear; my means of livelihood was in the business. We went before the legislature to fight for bread and butter, and by a chance Mr. Stevens, who was a fisherman himself, was lieutenant-governor and presiding officer of the senate of Rhode Island, and he defeated that bill. We have the record that Spencer F. Baird says that if that bill had been passed in 1867 or 1868 or 1869, when they tried to pass it, all the tendency of legislation in the United States would have been exactly opposite from what it is to-day, for the reason that in 1870 free fishing was allowed—anybody was allowed to fish where he saw fit. The scup, from a product of 100,000 barrels, went down to a product of less than 1,000 barrels. People who had been fishing there for a lifetime could not catch scup in Narragansett Bay. After 1870 the scup came on again, and in 1874 there were more scup on the southern coast of New England than ever was known in the history of the business. There were over 100,000 barrels taken in one year. There were only 1,000 barrels taken in 1870, and in 1874 there were over 100,000 barrels taken in the vicinity of Newport, showing that by allowing the fish free access to the coast things come out right.

That illustration I could repeat over and over again as to other fish. I could give you the sea bass; I could give you the mackerel; I could give you the tautog; I could give you the very fish that Senator Sewell speaks of, the weakfish. For instance, the other day I went into a place in Boston where a man was down square on this thing. He took the ground that we were the enemies of the fish. We talked it all over for a little while. The man said: "Mr. Church, do you recollect that in 1870 the squeteague came onto our coast, which they had not done for thirty years?" When I was ten years old the men who were on the deck would catch a boat-load right in Narragansett Bay. It was a common thing to catch the squeteague or weakfish, but I never caught one in my life with hook and line in Narragansett Bay. In 1870 that bay was literally crammed with them; you could catch them by the hundreds of thousands of tons. They were so plentiful that they did not ship them to New York, because it would not pay to take them out of the water and put them in a box. We can take every fish of that kind on the southern coast of New England, and give you practical illustrations of it if you want them, but if you do not want them we will not give them.

The CHAIRMAN. Please state the conclusions you have formed.

Mr. D. T. CHURCH. The conclusion I have formed from observation is this: That the supply and plentifulness of fish is from natural causes which man knows nothing about.

The CHAIRMAN. Does that apply to all fish?

Mr. D. T. CHURCH. To every fish; for instance, we go into this fish question—take it as a matter of history. We go to Sweden or go to Norway; there they have a record of over fifteen hundred years of the fish business. We can go to work and show you that there is a city on the coast of Norway of over 10,000 inhabitants that made their livelihood from herring for over a hundred years. We can prove to you that every herring left that vicinity; that the city became depopulated, and they were gone for a hundred years and more before they came back, and when they came back they became just as plenty as they had been be-

fore they left. Man simply gives the fact. I can offer you evidence as to codfish. Men used to fish for cod on the southern coast of New England, but in 1860 or 1861 they went away, because there were no codfish. The codfish were gone, and gone forever apparently; but in 1878 the codfish came onto this coast in immense quantities, and you could catch as many codfish as you saw fit. A man in Rhode Island could go off Newport and catch a boat load of fish. A 12-foot boat could go out and you could fill it with codfish. That applied to all the waters from Cape Ann clear to the capes of the Delaware. In 1878 there were landed in the city of Philadelphia so many codfish that they sold for less than $1 a hundred. I can produce hundreds of fishermen who did not go fishing because it did not pay to catch them.

In that connection I will make this statement to show just how that comes: The Rhode Island fish commissioner came before the Rhode Island legislature about that time, that very winter of 1878, with an ironclad law, making the statement that they were public enemies of Rhode Island; that they should be restricted and not allowed to catch fish. Then, as a climax to his statement, he said: "Gentlemen, there is no fish in Rhode Island waters; Rhode Island fishermen can not catch fish." When he got through, I said: "Gentlemen, to end this argument, I will agree under contract, and I will put down $10,000 that I fulfill my contract, that I can produce within one month 100,000 pounds of codfish, every one caught in the waters of the State of Rhode Island, and every one shall be landed for 1 cent a pound in the city of Providence, if the gentleman will put up $10,000 to the contrary." The gentleman walked out, and that ended the matter. I can give you all these points, and can give you illustrations and evidence in abundance if you want them.

Senator DAWES. What is your opinion as to the policy of the close season?

Mr. D. T. CHURCH. I do not think that is necessary, or, indeed any legislation. Of course, to a certain extent my testimony is interested, because I am a fisherman; but I can give you disinterested testimony—perhaps the highest authority in the world—the British commissioner, Thomas H. Huxley, a man high in the scientific world. He was put on the British commission in 1863, with direct instructions by the Parliament of Great Britain to go into an exhaustive examination of the question whether the fisheries of Great Britain would be destroyed by the improved methods of catching fish—the same question that we have here. The same arguments were used there then that are used here at present. For three years the investigation continued, and after asking sixty-three thousand questions he came before the Parliament of Great Britain, and with the commission unanimously agreed that there was no need of any legislation as to any fish that lived and spawned in the sea; and that is my judgment.

The CHAIRMAN. Have you that report?

Mr. D. T. CHURCH. Here it is.

Senator STANFORD. Have you observed that when one class of fish disappears another comes?

Mr. D. T. CHURCH. It is very apt to be that way.

Senator STANFORD. May not that account for the disappearance of a class of fish?

Mr. D. T. CHURCH. Take the Spanish mackerel; they were on the coast for twenty years, and when they left the bluefish came in. We were down in Maine in the menhaden fishery, and the legislature of that State passed a law against it, and the mendaden left. Of course

the law had nothing to do with it, but when the menhaden left a fish came in called the cayac, and there seemed to be as many fish of about the same species as plenty as the menhaden were on the Great George.

Senator SEWELL. Have you caught them?

Mr. D. T. CHURCH. No, sir; that is outside work there.

Senator SEWELL. The theory of this bill is based on protection within a certain distance of the shore for the hook-and-line fisheries. Why is it a special damage to your interest that we should protect them within 3 miles from shore and give you the rest of the ocean?

Mr. D. T. CHURCH. It amounts to the destruction of the business; there is evidence conclusive on that point from fishermen who know all about it. I know from my own observation that it would amount to the practical destruction of our products to the extent of about three-fourths or proably four-fifths of the fish.

Senator SEWELL. Do you mean that three-fourths of the fish are caught within the 3-mile line?

Mr. D. T. CHURCH. Yes, sir; more than that. This last year a school of porpoises came on to the coast and spread themselves from the capes of Virginia to Sandy Hook. It seemed as though the ocean was full of porpoises. Wherever porpoises are, other fish, no matter whether the menhaden, the bluefish, or fish of any other kind, get out of the way. The porpoises are the scavengers of the sea. The result was that the menhaden, regular fat sea menhaden, went into the Chesapeake Bay and located between the mouth of the Potomac and 40 miles above. That stretch of forty miles on the Potomac was the great place for the menhaden fishing last year, and they were never known there before. If we could not have fished within the 3-mile limit nobody would have had a chance to catch any of those fish, and all the Virginian fisheries would have been destroyed by such a law.

Senator DAWES. If you apply the 3-mile limit to the coast that you know of, and then exclude from the 3-mile limit that of which the States have jurisdction, what is left?

Mr. D. T. CHURCH. There is not anything left. The United States gives us a license to fish, and that license extends anywhere on tide-water. The law says that coasting vessels and fishing vessels shall have a license; the original law of 1790, I think, was drawn so that we have a right under the license to fish wherever we can.

Senator DAWES. How far does the jurisdiction of the State extend?

Mr. D. T. CHURCH. It does not extend anywhere on the tide-water, so far as fishing is concerned.

Senator DAWES. Not within the 3-mile limit?

Mr. D. T. CHURCH. The United States has full control anywhere where a vessel can float, in any bay, river, or inlet.

Senator ALDRICH. If this bill should pass, and you should be excluded from fishing within 3 miles of the shore, as it proposes, would it be possible or profitable for you to carry on your business?

Mr. D. T. CHURCH. No; it would amount to an annihilation of the business.

Senator SEWELL. You say the State has no right in the matter. Did not the State of Maine pass a law prohibiting this fishing within her borders, and has she not carried it out?

Mr. D. T. CHURCH. It has always been a cloudy line where they run together, but we have always taken the ground, and always won it, that the United States controls the matter. The State did pass such a law, but it is something the State has never been able to enforce.

ARGUMENT OF HENRY A. REEVES (OF GREENPORT, N. Y.).

Mr. REEVES. Mr. Chairman and gentlemen, I know very well that your time is too valuable to be spent in idle or irrelevant discussion, and, therefore, with a view to economy of time by avoidance of mere digression or dispute in the heat of debate, I have committed to paper what I desire to say to you upon the pending bill. I shall hope thereby to make my argument more direct and more compact, if not more impressive.

A single word personal to myself may be a proper preliminary. I am not a lawyer nor a paid attorney or advocate of the interest which, with my associates, I represent before you. Of course there would be nothing improper in being such an attorney, but it is best to be frank in such matters, and I wish it understood that in coming to this hearing I am moved simply by regard to the welfare of the community in which I live—a community very seriously, I may say vitally, affected by the bill under consideration.

Mr. Chairman, I address your committee on behalf of the menhaden fishery, against which a fatal blow is aimed by this bill. Because under it many hundreds, nay thousands, of worthy citizens, resident in greater or lesser numbers along the coast of all the Atlantic States from Maine to the Carolinas, are threatened with loss of immediate employment and the total destruction of their present industrial pursuits, I respectfully ask that you give to this case the attention which its actual importance deserves.

The bill before you, Senate bill No. 227, introduced on December 9, 1885, by Mr. Sewell, has for its nominal object, as expressed in the title, "protection of fisheries on the Atlantic coast." On a careful reading I find that it is wholly taken up with provisions for regulating one particular branch of the sea coast fisheries, and with imposition of penalties sufficiently severe to secure observance of such provisions; and on a still more careful consideration of the import and effect of those provisions I am forced to the conclusion that the bill, whatever its intent, does practically work destruction of the menhaden fishery. A few words may serve to set forth this latter fact so plainly that you will readily see and appreciate its full force.

To take menhaden in quantities available or profitable for use at factories, purse-nets are indispensable; no other means of catching them in either shoal or deep water exists. A prohibition on such nets is an embargo on the business. The fish are migratory, coming northward in early spring and going southward in late fall, inside the Gulf Stream, and apparently moving as the temperature of the water varies. An instinct of food seeking or of spawning brings them toward the coast and keeps them scattered in masses near the land or inside the bays, sounds, harbors, and estuaries indenting the shore from Maine to Florida during the period of their stay. While vast schools and numberless smaller bodies may sometimes be seen over many hundreds of miles within a distance of 1 or 2 miles from shore, it is rare to see any considerable number or large body further from land than this distance of 1 to 2 miles. The great bulk, fully nine-tenths or more, of these fish annually rendered at factories are caught in purse-nets, either inside of headlands or in the open ocean within a mile from shore. No factory does, or ever did, get enough fish taken in the outer ocean over a mile from shore to keep it running for a week. Hence, to stop the use of purse-nets within 2 miles from shore means the absolute closure of the busi-

ness as now carried on by either steam or sailing vessels. Only a few open areas resorted to by the fish, such as the middle part of Long Island Sound, the space between Block Island and Montauk Point, [the wider part of Chesapeake Bay], the wider parts of the Carolina Sounds, etc., would be left available for the fishery, and even if it were practicable for vessels while fishing to recognize and respect the 2 mile limit, it would be utterly futile to try to get in such limited spaces fish enough to make the business pay expenses.

It is therefore the language of soberness and truth to say that the passage of the bill would compel the immediate stoppage of the menhaden fishery—an industry which takes out of the teeming sea a material otherwise waste and valueless and from it makes articles so useful to mankind that their yearly production brings a cash return of millions of dollars. This direct and inevitable effect of the bill should be kept clearly in view. It does not propose mere restriction or useful regulation—it destroys and annihilates. Under it the factories would necessarily close; the capital invested to the amount of $1,500,000 or more, in buildings, machinery, steamers, boats, nets, and other gear, which would have little or no value for other uses, would be practically confiscated, and the thousands of good citizens either directly employed in the fishery and at the factories, or engaged in other lines of dependent industries, would be deprived of occupation in which they now earn honest livelihoods for themselves and their families.

This is not rhetorical exaggeration; it is not the plea of an advocate amplifying his case for effect; it is a simple, truthful, exact statement of the certain results attendant upon the passage of this bill. Such being the case, the question naturally arises, Why is such destructive legislation proposed? What necessity exists to warrant it? What reason can be given for striking out of existence so important, so useful, and so deserving an industry? Surely, there ought to be a real and commanding necessity in order to justify such an extreme exercise of legislative power. And if there be such a necessity it must needs be susceptible of proof. It must be tangible and real—something which can be measured and weighed in the scales of common sense and fair reason. What evidence that such a necessity exists has ever been or can be produced? I doubt not the good faith or sincerity of those who inspired or who favor this bill, but I believe them to be laboring under illusions which prevent their seeing either the full scope of their own measure or the weakness of the support on which it rests. I invite them to make public the definite grounds of their demand that the menhaden fishery be destroyed; and I respectfully insist that every member of Congress, before he gives his vote to the destruction of any legitimate industry, owes it as a solemn duty to himself and to his constituents, whether directly affected by the bill or not, to be sure that a necessity does exist so great and controlling as to justify such a step.

So far as I have been able to discover, after attentive consideration of this subject for years, there are but two allegations advanced by the opponents of the menhaden fishery to sustain their claim that it ought to be legislated out of existence. This bill, therefore, may fairly be supposed to stand on one or other, or both, of these allegations, which I hope to show you are merely allegations, unsupported by adequate proof. The bill assumes that to destroy the menhaden fishery would afford "protection" to other "fisheries on the Atlantic coast" This could only be possible in one of two ways, which answer to the two central ideas of the allegations referred to.

(1) It is alleged that the taking of menhaden with purse nets involves

the capture or destruction of food fish to an extent which warrants legislative prohibition of the use of such nets. I answer that no single instance has ever been shown of any considerable number of food fish being caught in a purse net, except a few large hauls of chequets or weakfish, which were mistaken by the fishermen for menhaden and were, whenever practicable, carried to the nearest market. Only a few such cases—less than half a dozen in a series of twenty or thirty years—have ever happened; but, even if it had been a frequent occurrence, its effect on the supply of weakfish has not been perceptible, and so far as these fish are concerned no complaint ever fell under my eye. The other surface sea fish which are supposed to feed upon menhaden to any considerable extent, are bluefish, bonitos, Spanish mackerel, pollock, and striped bass. Of these five varieties of edible fish, I confidently assert that there never were any large number taken in purse nets. Certainly, there will be no dispute of this assertion as respects bonitos, Spanish mackerel, pollock, and striped bass. I greatly doubt if five thousand of either or all those fish were ever taken in these nets since their use began in 1852.

The unvarying testimony of the officers and crews of the vessels, both sail and steam, employed in the menhaden fishery is that they do not take enough edible fish of all kinds to supply their own table, and this is not due to indifference or inattention, for the menhaden, as they are dumped into the vessel's hold, are carefully watched, and all eatable fish are picked out. In the volume of such testimony taken before the Senate committee in 1882 this fact is made clearly apparent. Every officer or fisherman examined swore to substantially the same thing—that, with the few exceptions as to weakfish, they had never known any considerable number of edible fish to be taken in purse nets. These men are honest and truthful; I can personally avouch the same general truth. For nearly thirty years I have resided at Greenport, where the menhaden fishery is carried on to a greater extent than at any other port in the State of New York, and, while I have never had a penny of interest in the business, I have been a close observer of its various phases, and I have conversed with hundreds of men engaged in the fishery, questioning them when there could be no possible suspicion of interest to bias their answers, and they have invariably told me that, with the exceptions noted, they had never known any considerable quantity of edible fish to be taken in purse nets.

This testimony extends to the bluefish, the only edible variety about which there could possibly be or has ever been any serious contention. These fish are ravenous, swift, and wide ranging; they are essentially a bottom fish, the main supply now marketed being taken with hooks dropped in deep water, much as cod are caught; but in pursuit of food they rise to the surface, and then show themselves, breaking the water, and at a distance, especially with the sun shining on them, may be mistaken for menhaden. They dash in and out among a school of menhaden, biting and tearing, apparently more in wantonness than to gratify their appetite. Indeed, as those whose business it is to open and clean bluefish for the table will testify, only a small percentage will have in their stomachs any trace of menhaden, while nearly all will have the whole or the partly digested bodies of small fish swallowed entire, including young fish of their own species. Bluefish are provided by nature with strong jaws and sharp teeth; they are dangerous customers to have in the net, which they readily bite in holes, or, what is worse, weaken in places without showing the full extent of the havoc they have wrought. No fisherman would knowingly inclose one of them, and no great number are ever inclosed.

The fishermen do their work in the daylight, and are rarely deceived in the character of the fish they undertake to inclose. When making a set, if on coming close to a supposed school of menhaden they find that the fish are wholly or principally weakfish, mackerel, or bluefish, they give up the pursuit and return to their vessel. Their business is exclusively the taking of menhaden for rendering at factories, and they avoid as far as possible the capture of any other species. Occasionally a few bluefish get wedged in among the menhaden so that they do not reach the net to bite their way out, and they find a fitting finale in the fishermen's mess.

It is emphatically true of bluefish, as it is true of bonitos, Spanish mackerel, pollock, and striped bass, that the menhaden fishermen do not and never did take any considerable number in their nets. And as to such bottom fish as cod, hake, flounders, flat-fish, porgies, or scup, sheepshead, sea bass, tautog, etc., which might feed on menhaden when they have a chance, it is enough to say that they are wholly outside the limits of this inquiry, since purse-nets, except when drawn in some very shoal waters, do not reach these fish; in fact there is no pretense that purse-nets affect the supply of these bottom fish, and there could not well be any such pretense, because it is precluded by the very operation of pursing the net, which lifts its lower line and draws it up over and away from the bottom fish, tons of which might lie inclosed within the circuit of the net without a single fish being caught.

(2) Proof failing on the first allegation, there remains the second, which is, that the operation of the menhaden fishery, especially since steamers have come into use, tends to diminish the chief supply of food for edible species by reducing the quantity available to their need and by scattering it over larger areas, thus driving away from the bays, rivers, harbors, etc., and to greater distances in the open sea, the several kind of food fishes which are supposed to make of menhaden their regular diet. To any one acquainted with the facts as they historically have been and as they actually are, it is not easy to treat this theory soberly, so untenable, if not absurd, does it appear, yet it is undoubtedly held with firm faith by many worthy people, and it is the main reliance of those who, whether they believe in it as a theory or not, support this bill. It must therefore be examined and discussed.

At the outset it should be known that this claim or hypothesis of what they allege to be the effects upon food fishes of steamers in pursuit of menhaden is upheld only by those persons who are directly or indirectly interested in fishing with hook and line, either for local markets and summer seacoast hotels, or to a still greater extent in the way of sport for themselves or for city people whom they take out in boats for a day's recreation on the salt water.

None of the fishermen engaged in the regular business of taking food fish for general consumption join in this outcry against the purse nets; they know its futility and injustice. The men who take fish in ponds, fykes, weirs, or other traps, which are now not only the methods most in vogue, but also the most effective and most scientific methods for supplying to city markets fresh fish in its best condition as food, at first when purse nets were a new contrivance, and especially when they were first used on narrow bays, were inclined to antagonize them; they feared that such nets would be ruinous to their own mode of fishing, and for some years they remained suspicious of the "pesky purse netters;" but further experience has convinced them that there is no interference and no detriment to them resulting from the use of the purse nets. The smack fishermen, who supply the city markets with fresh cod, sea bass,

and even with the disputed bluefish itself, and the large number of fishermen engaged in taking mackerel, have no complaint to make against the menhaden fishermen except that sometimes they can't get all the menhaden they want as bait with which to set their trawls or otherwise to allure their finny prey.

It ought to be further recalled that the section of seacoast on which this alleged damage to hook-and-line fishing is claimed to result from the use of purse nets may be said to be practically limited to the coasts of New Jersey and Long Island. Elsewhere, both north and south, so far as I can learn, there is no serious trouble, and no complaint has been made public. The demand for the destruction of the menhaden fishery is confined to those persons, few or many, who want to enjoy hook-and-line fishing along the coasts of Long Island and New Jersey, and who fancy they would be more sure of a day's successful sport or catch if the bays, rivers, harbors, and the open sea for 2 miles out could be turned by legislation into a fish preserve from which the obnoxious steamers and the terrible purse nets should be rigidly excluded.

Admitting that this fancy of theirs, for which no verified basis of fact has ever been presented, deserves serious attention—and it seems to have so far impressed the committee as to secure, at a former meeting, its partial acceptance and favor for this astonishing bill—its whole foundation is upset by a single established fact, which is matter of record, and does not admit of denial. Bluefish were not accounted of much commercial importance as a food fish until after 1870. For many years they were not seen at all on the northern seaboard, and a generation grew up in such ignorance of the bluefish's superior table qualities that when they again visited their old resorts, and some of them were shipped to market, they could not be sold for more than 1 or 2 cents per pound.

It happens, also, that steamers as a more speedy and sure means of pursuing menhaden did not begin to supplant sailing vessels until after 1870. Yet it is true—indisputably true—that since then the yearly supply of bluefish, as well as of edible fish in general, has steadily increased in New York City markets, and though population has grown rapidly and facilities for transportation of fresh fish to distant points have multiplied, and the use of refrigerator rooms for storage of iced fresh fish has taken large quantities to be kept until out of season, so that the demand for fresh bluefish might fairly be expected to outrun the supply, prices have not materialy changed during recent years.

The operations of the menhaden fishermen have extended, the number of steamers has enlarged, and the aggregate catch has increased, yet during this same period of ten or twelve years the bluefish have been caught in greater and greater numbers, and their market price, which is the surest criterion of relative scarcity or plenty, has fluctuated within very narrow limits, averaging but little above what it was fifteen years ago. It thus appears, conclusively, that so far as concerns the question of "protection" to the bluefish which are sold in the main distributing markets of the country, there is no need of any; their number increases and their selling price remains at a low figure, without any legislation.

It follows, that if there be need of "protection" to any kind of "fisheries on the Atlantic coast," it must be the fishery with hook and line out of small boats propelled by oars or sails, either for profit or pleasure; and the only kinds of fish so taken which could be affected by the menhaden fishery are bluefish, cheqnet, Spanish mackerel, bonitos, and striped bass. The question is pertinent, then, in what way and to what

extent does the pursuit of menhaden by steamers and their capture in purse nets affect these varieties of edible fish?

It has already been shown that none of them feed upon menhaden exclusively or mainly, and that no considerable number of any one or of all of them was ever caught in purse nets, except on three or four occasions.

Such being the case, the presumption must be that the asserted effect of the menhaden fishery upon even those fish which are chummed for or trolled for or otherwise caught out of small boats with hooks and lines can not be important. This presumption can only be overcome by positive proof to the contrary.

The advocates of the bill should be required to produce such proof before the least tolerance is given to their demand for that extraordinary sort of "protection" which involves the destruction of another, a larger, and a far more useful branch of the fisheries. Have they done this? Has a single item of reliable proof from disinterested and competent sources been laid before the fisheries committee, going to show that the clamor against the menhaden steamers has any solid basis? I can not learn that this has been done; I can not learn that any valid testimony from witnesses who speak with positive certainty, and are entitled to full credence, has been submitted in support of this bill. Abundance of ideas and beliefs may have been elicited; opinions naturally vary widely on subjects so recondite and so little understood as the habits and movements of fishes in the great deep. You may have had theories advanced or views expressed by experienced men, and even by scientists themselves, which a larger knowledge and more complete inquiry would disprove; in fact, on the fundamental question underlying this whole agitation—the question of what effect, if any, man's operations have ever had or can have on the quantity of fish in the sea—such leading American authorities as Professors Baird and Goode and Mr. Blackford began their investigations years ago with a prejudice, if I may so speak, against the menhaden fishermen similar in kind if not in degree to the sentiment toward them held by many good people of New Jersey and Long Island; but in their case continued observation and analysis of recorded facts led them to modify their first impressions, and to coincide with Huxley and other naturalists, who affirm that nothing man can do will make any material difference with the coming or going, the scarcity or plenty, of fishes in the sea.

The bill, I respectfully submit, rests upon assumptions and ignores facts. But even if, for argument's sake, this asserted effect be admitted, it is still a legitimate inquiry whether the larger ought to give way to the smaller, the more valuable and more useful to the lesser, the practical and beneficial industry to the quest of sport or pleasure.

The foregoing discussion has, I think, demonstrated that the only kind of "fisheries on the Atlantic coast" which claim to need "protection," and in order to get it demand the destruction of the menhaden fishery, is that which is practically restricted to the coast of two States, and which employs small boats during a few months of the year for taking food fishes with hook and line, largely for sport. This is the actual extent and nature of the need for "protection" which, it is assumed by the bill, warrants and requires the absolute extirpation of an industry foremost among the maritime activities of the American people. Ought there to be the least hesitancy in any honorable legislator's mind as to his duty in relation to such a bill? If the sense of right and justice to which I appeal were not of itself enough to enforce the conclusion that this bill does not deserve any countenance or support from

either house of Congress, I desire to ask your further attention briefly to the economic aspect of this matter.

Aside from the uses made of menhaden for food, either fresh, salted, or put up in oil like sardines, the principal products of the fishery, indeed the only ones which concern this inquiry, are oil and scrap or guano. The oil as now made is a clean, sweet, pure, and limpid article, largely used in the industrial and mechanic arts, and also mixed with other animal oils. There is no way of reaching the precise production of oil and scrap, because no authenticated figures covering the whole field of this industry have ever been reported, but a sufficiently near approximation can be had.

The United States Menhaden Oil and Guano Association was organized in January, 1874, and its local statistical committees, in their yearly reports to its secretary, have included nearly or quite all the manufacturers within their respective districts. From its reports for the thirteen years from 1873 to 1885, both inclusive, it appears that the total production of oil at the factories, so reported, was 31,314,156 gallons, or an average of 2,408,781 gallons each year; that the price of fish oil, which, in 1870, just preceding the introduction of steamers into the fishery, was 60 cents a gallon, has gradually declined, until for 1885 it averaged under 30 cents a gallon; and that a fair average price for the thirteen years would be 40 cents, at which figure the aggregate yield of oil was worth to the manufacturer $12,525,662.40, or an average of $963,512.50 each year.

Beside this direct cash value of oil produced from menhaden, amounting yearly to nearly $1,000,000, the utility of the manufacture to the country in cheapening prices of all kinds of animal oils, and also, to a considerable extent, of vegetable oils, while it can not be computed with exactness, has obviously been very large.

Further light on the importance of this product of the menhaden fishery may be had from a comparison with the importation of whale oil during the same period. As appears from the tabular statements in the New Bedford Shipping List's Annual Review of the Whale Fishery for 1885, it appears that during the thirteen years from 1873 to 1885, both inclusive, there were brought into American ports 12,708,543 gallons of whale oil, which, at the average price for those years of 53 cents, would have been worth $6,735,527.79; but of this quantity there were exported 2,382,381 gallons, worth $1,262,661.93, leaving for domestic consumption a total of 10,326,162 gallons, or less than one-third the production of menhaden oil, and a total value of $5,472,865.86, or less than one-half of that of the menhaden oil made in the same period.

The other product of the menhaden fishery, the refuse left after expressing the oil, is called scrap, pomace, or fish guano. It was formerly used in the crude state, either as a fertilizer applied direct to the land or, to a far larger extent, it was mixed as an ingredient in the manufacture of commercial fertilizers, its large percentage of ammonia making it the most important and active agent in quickening and strengthening the other properties which give such fertilizers value as plant food. Of late years most of it has been sun-dried at the factories, and thereby made more available for carriage to distances and more convenient and efficacious for use. It still remains the chief source of supply of ammoniacal basis for commercial fertilizers, though increasing demand has led to partial substitution of other substances, none of which, however, have taken its place.

From the annual reports of the above association, it appears that, reducing the crude scrap when reported to its equivalent weight in dry

scrap, there have been manufactured at the factories reporting to the association in the thirteen years from 1873 to 1885, inclusive, 610,399 tons, or a yearly average of 46,954 tons. As it is estimated that in a ton of manipulated fertilizer ready for the soil the usual proportion of scrap is one-quarter, it is seen that the factories in the past thirteen years have contributed the ammoniate for 2,441,596 tons of fertilizer, or at the yearly rate of 187,816 tons. As it is usually considered that in growing cotton, for which crop these fertilizers are largely used, 250 pounds are needed to raise one bale, it would follow that if the fish scrap made on an average each year at the factories reporting to the association were all applied to the raising of cotton, it would have yielded a crop of 1,502,528 bales.

A still more striking view of the immense importance to the agricultural interests of this country which the menhaden scrap or guano possesses may be seen if the fact be recalled that since 1870 the large and then increasing importations of Peruvian guano, which sold at $60 and upwards per ton and took several million dollars each year out of the pockets of American farmers, have been almost stopped, and its place in the economy of fertilizing American fields has been taken by the menhaden scrap. If we assume that without the scrap there would have been need for an equal quantity of Peruvian guano, then the 610,399 tons of scrap would have been worth to growers of cotton, sugar-cane, corn, and other farm products, a sum not less than $36,623,940, or at the yearly average of $2,817,240. The saving, moreover, effected by this exchange of a foreign for a home-made guano will readily appear from the fact that, whereas the former sold for $60 or more per ton, the latter has averaged in price less than $30 per ton.

There are other considerations which might be urged in connection with this branch of the subject; but I have said enough to show conclusively the great economic importance of the products of the menhaden fishery—an importance which runs far beyond the immediate cash return which they bring to their manufacturers—and I do not wish to weary your patience.

I ought not, however, to close without again reminding you that this bill, if enacted, would work a practical confiscation of the capital invested in factories, machinery, drying platforms, scrap-houses, steamers, boats, nets, and other gear employed in the business. Most of this material, machinery, apparatus, and vessel property is adapted to the particular uses for which it is designed, and would have little or no value for any other purpose. To forbid its use in taking and rendering menhaden is therefore to confiscate nearly or quite its entire present value to its owners, who, in prosecuting a legitimate industry, have expended large sums of honestly earned money. They now have considerably over $1,500,000 in property which this bill would render almost valueless. I therefore insist, as the simplest dictate of common justice, that before the bill becomes law, should such a calamity be possible, it ought to provide for a commission to appraise and award the compensation which should be paid to the owners of this confiscated property.

Such, gentlemen, has been, to my mind, the overmastering import of this bill as dealing a death blow to the menhaden industry that I have not stopped to examine it in a merely critical sense. But a pertinent illustration of its rash and reckless nature is afforded in its second section, which forbids the use of purse-nets "or other appliances" along the Atlantic coast or in any bay, river, harbor, etc., "for the capture of fish to be manufactured into oil or into fish guano or other fertilizing

material." No matter what the nature of the fish from which oil or guano may be made, whether fit for food, like porpoises, or merely predaceous, like sharks, they may not be taken in any purse-net "or other appliance" along the entire Atlantic coast for 2 miles out to sea, where alone they would or could be taken to any advantage, and are thus left to the undisturbed possession of the ocean, "protected" by the American Congress from the enterprise of American citizens who might utilize them for the benefit of themselves "and the rest of mankind." This is to be done over 2,000 or more miles of seaboard, although the source of trouble supposed to require such heroic treatment—the *casus belli* in this war upon legitimate industry—is confined to about 200 miles of coast, and is there a myth or a mere guess, with no solid basis of ascertained fact. To still further exemplify the wholesale folly of this section, it may be stated that on the coast of Maine last year another species of herring, locally known by the Esquimaux term, kiack, were found to yield oil in paying quantities, and two factories manufactured 50,000 gallons of oil and 900 tons of scrap. Under the bill this kiack fishery, on a coast where there is no pretense and hardly a possibility of interference with any other fishery, is to be cut down in its promising infancy in order that Long Branch hotels may hope to have fresh bluefish on their tables continuously and short branch railroads may entice fresh travelers from the interior in quest of promised sport with hook and line.

Finally, with a few words in review of the main point presented in the bill and of the argument I have essayed to make against its passage, I am done.

The only kind of "fishery on the Atlantic coast" that demands any measure of "protection" against the menhaden fishery has been shown to be fishing with hook and line in small boats going out from the shore, mostly in bays, rivers, and harbors, which are clearly within what the lawyers call the *fauces terræ*, and are therefore subject to State jurisdiction. The feeling which inspires this demand is limited to a narrow strip of seacoast, principally of New Jersey, and even there is not shared by farmers and others who do not have a direct concern in the use of boats, or in the business of keeping summer hotels and boarding houses.

These parties in interest, the hook and line fishermen (perhaps not all of them, but a majority), the hotel and boarding house keepers and the managers of shore lines of railway, have or claim to have become convinced that the fishing which is so great an attraction and so valuable an industry, has been impaired and broken up by the operations of the menhaden fishermen, and in order to be "protected" they ask Congress to pass this bill. They do not adduce any attested and established facts in support of their claim, but when questioned the most experienced fishermen on that coast offer only opinions and beliefs.

Were the steamers to be stopped, as this bill would stop them, other conditions remaining unchanged, there is no evidence whatever that bluefish would be any more plentiful in the waters for which protection is asked. Indeed, only a year ago last August, with all the steamers in full pursuit of menhaden, there came on the Jersey coast such a run of bluefish that at Sea Bright they were reported to have been sold at 2 cents apiece, and for a time, about the same period last year, the bluefish were very plentiful on that coast, as may be seen by the fol-

lowing item clipped from Long Branch correspondence of the New York Times, under date of September 5:

> Bluefishing is most excellent now. The fishing banks off the Branch are daily covered with craft of all kinds, and the water is rippled in hundreds of spots by swiftly moving shoals of fish. Many of the young men who are spending their time at the Branch go out through the surf with the fishermen and make fine hauls.

On the other hand, the greatest naturalists of the age, who have spent years in patient investigation of the habits of fish and in study of the history of their movements wherever recorded in the annals of the world, are fully satisfied that man is powerless to make any real or lasting impression upon the great bodies of fish in the sea, and that periods of relative scarcity or plenty prove nothing as to causes that have produced those effects.

Appearances and disappearances of particular species of sea fish on certain coasts have repeatedly been noted in history, and within the present century mackerel and bluefish have left the shores where they had been abundant, and have returned in numbers as great as before or greater; and these occurrences took place long before the menhaden fishery had been begun. Moreover, the number of menhaden yearly manufactured into oil and scrap, great as the figures appear, are but a flea-bite compared with the number annually consumed by predatory fish, birds, and sea reptiles. In the past thirteen years of recorded statistics the average number rendered at factories was 567,423,000; but Baird estimates the total consumption of menhaden in a year by their natural enemies to be three thousand millions of millions; so, if the average number taken by man were to be doubled, it still would be only as one in three thousand millions of those annually destroyed, to say nothing of the still greater numbers who survive.

Even if it be conceded that there is a real and not a merely apparent decrease in the number of food-fish along the coasts of Long Long and New Jersey at the present time as contrasted with fifteen or twenty years ago, if, while the market supply of these fish has more than kept pace with the increased demand, there is a perceptible falling off in the catch at any given point on those coasts, I still ask, in the light of the authentic facts and figures presented and of the deliberate judgment of such eminent scientists as Huxley, Tyndall, Baird, and Goode, is it not a violent and wholly unsustained assumption to allege that the steamers or the purse-nets used in catching menhaden have or can have anything to do with diminishing the supply of fish which are not caught in purse-nets and which do not need menhaden as food, or, of they do, have them in abundance and more widely scattered as a result of their pursuit by steamers. And I again ask, ought legislation of so sweeping and disastrous a character as this bill prescribes to be based on mere assumptions, without any fixed foundation of clearly established fact.

Senator SEWELL. I should like to ask Mr. Reeves a question. Are you engaged in this business yourself or do you appear as counsel?

Mr. REEVES. As I said, I am not a lawyer. I am not the paid advocate or attorney of the menhaden fishery, which I come here in part to represent. I wish it distinctly understood that I came here impelled solely by regard for the wefare of the community among which I live, which community (the village of Greenport) is more largely affected by this bill than any other community in the State of New York, or perhaps any other of equal size in the country. One of its main industries, perhaps the leading industry of that village, is the menhaden fishery, which is conducted by citizens having factories at distances of 10 or 15 miles away.

Senator SEWELL. Associated companies?

Mr. REEVES. Some of them are and some are individuals. There are some twelve or fifteen of them, but the number in practical operation last year, I think, was eleven or twelve.

Senator DAWES. You stated in the beginning that you had no interest in it.

Mr. REEVES. None whatever. I have never had a penny of interest in the matter; I have simply been a looker-on My only interest is because I reside in a community that is so largely engaged in the business, and naturally I have listened to whatever was going on and have learned what there was to be known about it. I have not a knowledge of the practical details which gentlemen who are with me have, and, of course can not answer questions of that nature; but any question which relates to this inquiry under the terms of the bill I have endeavored to set forth.

The CHAIRMAN. You spoke of millions of dollars being invested in these factories.

Mr. REEVES. A million and a half is the estimated amount, I think.

The CHAIRMAN. You spoke generally of millions of dollars along the coast. I have no doubt there are millions, but have you any idea of how many millions?

Mr. REEVES. I said a million and a half, judging from the returns made by the Menhaden Oil and Guano Association, from whose reports I have obtained most of my statistical information. As reported in January last, the amount then invested was $1,400,000; but there was a considerable amount of property not employed in the fishery during the year—factories not in use. Probably there are $300,000, $400,000, or $500,000 not included in this report.

The CHAIRMAN. Do you know how many factories there are?

Mr. REEVES. I have not the statistics of them with me. Some of the gentlemen, I presume, have. One gentleman says fifty-odd factories on the Chesapeake Bay, and about one-third were used last summer.

Senator RANSOM. I do not mean to be officious, but I see in looking over the very carefully written memorandum by Mr. Goode, on page 15, it is said:

> In 1878 the menhaden oil and guano industry employed capital to the amount of $2,350,000.

It goes on and states the number of men and vessels employed and the fish consumed, and then concludes:

> The value of the menhaden fishery for this year being $1,658,000.

Mr. D. T. CHURCH. There are between $4,000,000 and $5,000,000 invested, but the returns reduce it to about 25 per cent. on the dollar practically.

REMONSTRANCE OF PERSONS INTERESTED.

Senator ALDRICH presented to following memorial:

To the honorable Committee on Fisheries of the United States Senate:

GENTLEMEN: The undersigned, manufacturers of menhaden fish oil and fish guano and dealers in the same, and others interested in the industry, do most earnestly and respectfully protest against the passage of the bill known as the Sewell fishery bill, which we believe to be unjust in its provisions, inimical to an important industry which the passage of the bill would practically extinguish, entailing serious losses on those engaged therein, while it would subserve no good purpose and prove beneficial to no industry. We believe the bill to have been prompted through a misappre-

hension, and therefore respectfully ask that you make a thorough investigation of the facts, believing that such action on your part will convince you that the bill is unjust, and should not become a law.

Stearns & Company, by Oscar H. Stearns.
P. White's Sons.
Swan & Finch, 151 Maiden lane.
Heller, Hirsh & Co., 164 Front street.
Geo. E. & F. W. White, 159 Front street, New York.
The Mapes Formula and Peruvian Guano Co., by Edward Z. Lane, treasurer, 158 Front street.
Geo. B. Forester (absolutely opposed to the bill) 169 Front street.
E. Frank Coe and Julian D. Fairchild, 16 Burling Slip.
Alfred S. Malcomson, 172 Pearl street.
H. F. S. Chambers, 81 Pine street.
G. T. P. Chambers & Co., 81 Pine street.
George Lowe, 145 Maiden lane.
B. F. Eaton, East Lyme court.
Wakeman & Fiegs, 143 Front street.
Thos. G. Hunt, 137 Front street.
James F. Shay, 18 Fletcher street.
Edwin Swain, 132 Front street.
Nehemiah B. Cook, 148 Front street.
Jasper Pryor, 143 Front street, New York City.
George Delano's Sons, 140 Front street.
Geo. Leonard, 141 Maiden lane.
Louis C. d'Homergue, 35 Murray street, New York.
A. L. Knight, 7 Ferry street, New York City.
L. R. Welles & Co., 14 and 16 Vandewater street.
J. J. Austin, 159 Front street.
Edwin W. Adams & Co., 114 Wall street.
Fidelity Manufacturing Company, Philadelphia, Pa., E. N. Jenkins, secretary.
T. M. Ware & Co., Boston.
Geo. H. Leonard & Co., Boston.
J. D. Loftus & Co., Boston.
Meriam & Morgan Pff. Company, Boston, per Frank L. Young, manager.
Joshua G. Nickerson, Boston.
H. B. March, Boston.
Nathan F. Carruth & Co., Boston.
Henry D. Wilder & Co., Boston.
Atlantic Fertilizer Company, Boston.
A. B. Johnson, Boston.
Elijah Bent, Boston.
Underhay & Co., Boston.
Waite, Williams & Co.
H. L. Macomber & Co.
C. A. Whittemore & Co., Boston.
J. A. Tucker & Co.
H. W. Loveland, Boston.
A. B. Perry & Co.
Bowker Fertilizer Company, by W. H. Bowker, president.
Benj. Bickerman.
George B. Nichols.
Herman Smith.
Adams & Harrington.
Thomas E. Proctor.
John B. Alley & Co.
George F. Putnam.
James Houston & Co.
Arey, Maddock & Locke.
Bradley Fertilizer Company, by Rob. T. Bradley, treasurer.
Cochrane Chemical Company, by Hugh Cochrane, vice president.
Geo. J. Furr & Co.
E. & J. S. Bent.
Loring & Avery.
Geo. A. Hull & Co.
Winston & Co.
A. W. Dodel & Co.

STATEMENT OF JAMES E. OTIS.

JAMES E. OTIS (of New Jersey). Mr. Chairman, I live on what you may call the largest bay there is in New Jersey, outside of the Delaware Bay, and where there are supposed to be a great many bluefish caught. It is the Great Bay, in the counties of Atlantic, Burlington, and Ocean, New Jersey.

In regard to the food fishermen, I would say that we have watering places there on the beach where a great many people from the cities go, and while there catch fish and go gunning. It is advertised as being the greatest place in the known world for that business by the railroad people. At certain periods of the season there are large quantities of good fish there, and at that time we catch all we want and more, too. At other periods we do not catch any. The fishermen are asked what is the cause of it; they give the most ready excuse that comes to their mind, and say the menhaden fishermen have caught them all up.

The CHAIRMAN. Has this been the case for the last fifty years at irregular intervals?

Mr. OTIS. I do not remember as long as that; about twelve years I am speaking of. I know of that.

The CHAIRMAN. But these intervals have existed?

Mr. OTIS. Yes, sir; it is the same way with the menhaden outside. We have been six weeks without seeing any, and then they would strike in and jam up the whole water way.

Senator DAWES. What is the interest that is promoted by this bill?

Mr. OTIS. I do not think there is any in my section of the State.

Senator DAWES. There must be some interest promoted by it or the bill would not come in.

Mr. OTIS. That is about a fair statement. These amateur fishermen when there are no fish there ask the men who take them out what is the cause of their not catching any fish, and they say, "The menhaden fishermen have caught them all up."

Senator DAWES. What is your opinion about that?

Mr. OTIS. My opinion is that when there is a run of fish they get all they want and more, too; but when there are none nobody can get any.

Senator DAWES. What is the effect of taking menhaden by those employed in taking them for fertilizing purposes? What effect has that upon fishing within the 3-mile limit?

Mr. OTIS. The menhaden and most of our fish we catch within a mile of the shore.

Senator DAWES. What is your opinion about its depriving food-fish of their food?

Mr. OTIS. I do not think it has anything to do with it at all.

Senator DAWES. Do you mean to say that in your opinion the catching of the menhaden as it is carried on now does not affect fishing with a line within 3 miles?

Mr. OTIS. No, sir; most of the fishing we have with us with hook and line is not outside but inside in the bay.

Senator DAWES. Within 3 miles?

Mr. OTIS. The bays are inland—inside waters.

Senator DAWES. Are the menhaden taken inside?

Mr. OTIS. No.

Senator DAWES. Then, if this bill should prohibit the fishing for menhaden within 3 miles, what harm would it do to the menhaden fishing?

Mr. OTIS. It would kill the business.

Senator DAWES. How would it if you do not take them within 3 miles?

Mr. WHARTON. The State law of the State of New Jersey forbids such fishing within the bays. It does not undertake to say anything about the fishing outside the coast line, but within the bays it is prohibited.

Senator DAWES. Does it prohibit all fishing?

Mr. WHARTON. It prohibits all menhaden fishing within the bays. Almost all the menhaden fishing is done where Mr. Otis says—outside, of course, because they are not allowed to fish inside; but nine-tenths of the fish caught in New Jersey are caught between the shore and the 3-mile limit.

Mr. OTIS. Caught within a mile of the beach.

Senator DAWES. Then, you mean to say that this bill would prevent the catching of menhaden as it is now carried on?

Mr. OTIS. Yes, sir; it would kill the business. The bill, as I understand, makes a line. We would suppose that a man would pretty nearly go through a 9-inch mesh if he was not too large. The menhaden are small fish.

Senator DAWES. What is the size of the mesh that menhaden are taken with?

Mr. OTIS. Two inches, or a little more.

Senator DAWES. This bill absolutely prohibits menhaden fishing within the limits prescribed in the bill; and that prohibition you say would have the effect to kill the business?

Mr. OTIS. Yes, sir; it would kill the business.

The CHAIRMAN. Whom is this bill intended to benefit?

Mr. OTIS. That is what we should like to find out. I have talked with the people along that shore, and I can find but very few who know anything about the bill.

Senator DAWES. Are you acquainted with the fishermen on the shore who contribute to the supply of the New York market?

Mr. OTIS. No, sir.

Senator DAWES. You do not know where they get their fish?

Mr. OTIS. No.

Senator DAWES. Do you know where the men get their fish who fish with a line and carry the fish to the market of New York and other markets?

Mr. OTIS. They get them in those inland waters that I mentioned.

Senator DAWES. Are they in favor of this bill?

Mr. OTIS. Not that I know of.

Senator DAWES. Are you acquainted with them?

Mr. OTIS. Yes, sir.

Senator DAWES. Have you conversed with them about this?

Mr. OTIS. Yes, sir.

Senator DAWES. What do they say?

Mr. OTIS. They are as much opposed to the bill as it stands now as we are, for this reason: As I said before, these amateur fishermen go out and if there do not happen to be fish there so that they do not catch any, they ask the reason, and the boatmen tell them the menhaden fishermen have caught them all up. That has been the cry, and now they say this bill has been introduced with, perhaps, a possibility of its becoming a law, and they are as much worried about it as the menhaden fishermen, because they say if it does become a law here are three hundred men in the county of Burlington that rely on menhaden fishing for a livelihood who will go right in and go to fishing with hooks and lines and compete with them and take their living away from them.

STATEMENT OF C. H. PARSONS (OF GLOUCESTER, MASS.).

Mr. PARSONS. Mr. Chairman, I come from a big fishing town, and I believe there were some people last week before a committee fighting a reciprocity treaty. I represent the oil business. I am not in the menhaden fishery, but I buy their product together with the codfish product. That is our whole business. We sell our product to the tanners and curriers, and such like. I claim that if this bill passes it will entirely obliterate the menhaden fishery and will injure the tanning interest. Of course, as you well know, tanners have to have oil and grease to put into leather, and they are always after cheap greases. The result of the menhaden fishery has been to keep tallow and grease down to a figure where the tanners can use them and manufacture the leather to advantage. If we now have this bill passed and take out of the market 50,000 barrels of oil (for that is about the average of what the menhaden fishermen catch, as near as I can estimate) it will make grease of all kinds go up, and tallow will go up. It is now 3¾ cents a pound, and that is the cheapest known, and other greases are in the same proportion.

If this is taken out of the market entirely instead of paying, as to-day, 35 cents a gallon for cod-oil for tanners' use, we shall be obliged ts pay 50 cents and more a gallon for it. We can not afford to pay those prices. Now, this is a competition with tallow. Of course, tallow will not advance a great deal, because tallow now, as they are killing cattle for hides and meat, is increasing and the consumption of fish oil is decreasing amongst the tanners. All that will induce the tanners now to use fish oil, and, of course, what they use helps the fishermen so much, and it is used because of the cheapness of the article.

Senator RANSOM. Will tallow or anything else answer the purposes of the tanners as fish oil does?

Mr. PARSONS. It will. We import a grease from Europe that has taken the place of fish oil somewhat, and cheapened the price somewhat.

Senator RANSOM. You import that from Europe?

Mr. PARSONS. Yes, sir.

Senator RANSOM. You have it not here?

Mr. PARSONS. We have it not here.

Senator RANSOM. Is it as good as the fish oil?

Mr. PARSONS. It is.

Senator RANSOM. How many barrels of oil do you get from this fishery?

Mr. PARSONS. I should judge, in round numbers, about 50,000.

The CHAIRMAN. What do you mean by that?

Mr. PARSONS. That is what the menhaden fishery produces.

The CHAIRMAN. Altogether?

Mr. PARSONS. On the Jersey coast and on the Sound coast.

The CHAIRMAN. That includes the whole coast of the United States, so far as you know?

Mr. PARSONS. As far as I know. Some years it may be less and some years more, but I should think 50,000 barrels would be a fair estimate of what the product is.

The CHAIRMAN. What is it worth a gallon?

Mr. PARSONS. It is worth to-day 30 cents. It was bought this season for 25 cents. That is about the average price of the product this year—25 cents a gallon. It has gone up a little now. Furthermore, this oil is refined and it is largely used in the mines for burning-oil in lamps

Miners can not use petroleum oil of any kind in their lamps on account of the explosive nature of it; therefore they have to use fish oil, and it is refined and a large consumption is taken there.

The CHAIRMAN. Is that the commercial name of it—fish oil?

Mr. PARSONS. Yes, sir, fish oil; as far north as the whole fishery goes. I know a little something about that. I have dealt in it in the menhaden field; it is called "slivers." They used years ago to sliver the fish, but that was before they used to press them so much for oil. They cut off each side of the fish—we call it a sliver—leaving the backbone intact. That we used to salt and barrel up the same as mackerel, to be used as bait for the cod fisheries. It is done so yet, but not to so large an extent as formerly. Now they use more phosphate, and our vessels go to Newfoundland and get fresh herring and bring them home iced up, frozen, and kept in a box and then broken out and sold to the fisherman for bait, fresh bait, to go on the banks fishing. At times they can not get herring from Newfoundland, and therefore they have to resort to porgies, as we call them, which are used with menhaden for bait to take its place. They are largely used in that way. Therefore, if this bill passes it will prohibit our fishermen from getting any bait, and that would kill their business as far north as the shore fishing goes to get fish, haddock, and such like.

The CHAIRMAN. There permit me to ask you, Mr. Parsons, what amount in full does this bait product amount to?

Mr. PARSONS. It would amount to as much as they wish to use.

The CHAIRMAN. But how many dollars in a year do you estimate it?

Mr. PARSONS. I can not tell you.

The CHAIRMAN. What proportion of the bait do they use?

Mr. PARSONS. We have sold ours when we had to salt them and sliver them as high as from eight to ten thousand barrels a year. I suppose in Gloucester there have been used as high as five thousand barrels a year of menhaden.

The CHAIRMAN. At how much a barrel?

Mr. PARSONS. We used to get from $4 to $7 a barrel for the bait.

The CHAIRMAN. But you do not know the aggregate?

Mr. PARSONS. No; to-day I should judge fresh bait would be worth——

The CHAIRMAN. But the aggregate amount?

Mr. PARSONS. I do not know.

Mr. D. K. CHURCH. A half million dollars at least, I suppose, is expended for bait.

Mr. PARSONS. These vessels go to George's fishing there, and they get the largest supply of codfish for the Boston, New York, Philadelphia, and Chicago markets Something like 100 sail go from Boston. About half of these belong to Gloucester and about a third to a quarter or more belong to Boston, called the Irish boats, and the balance belong on the south shore about Provincetown. They go on George's now and feel for the fish there, and they use all this fresh bait. That is where your markets are supplied from. They are not supplied from the Jersey coast or Block Island shore, for the few fish got at Block Island in the winter season would not supply a small village with fresh fish. The main supply is drawn from George's, and they must have this fresh bait to fish with.

I cannot see for the life of me that the menhaden fishery injures any food fishes at all. It is rather a benefit to them. Certainly in our business it would be a great detriment to us to have the menhaden taken off the market. We could not carry on our business and be confined to the

ports of Gloucester and Provincetown. That is the only source we have to buy our oil in. We should have to buy then, of course, nothing but the cod oil of the provinces. If the bill passes and the duty is kept on oil it takes that market out of us. The duty there is 25 per cent. ad valorem, and that amounts to about 10 cents a gallon, and we can not furnish them oil down there and make a profit. Therefore it is very essential that this fishing should go on as it is, and that the tanners should have their oils and greases as reasonable as possible.

Senator SEWELL. Are you engaged in menhaden fishing?

Mr. PARSONS. No, sir; I am engaged in the oil business, and have been for twenty years, buying the oil product of the cod fishery and the menhaden-fishery.

Senator SEWELL. Are you familiar with the oil product of the menhaden fishery?

Mr. PARSONS. I am familiar only in this way, that I have visited their factories time and time again, and am acquainted with the oil.

Senator SEWELL. Will you give us the locations of the factories north and south along the coast where they are?

Mr. PARSONS. I can not give the exact localities of them. I have followed them on Long Island, at Green Point, Barren Island, Fire Island, and at Tiverton, in Rhode Island.

Senator SEWELL. They run from Rhode Island to Cape Henry?

Mr. PARSONS. Yes, sir.

Senator RANSOM. And below Cape Henry?

Mr. PARSONS. I never saw them below Cape Henry.

Senator SEWELL. Do you know the proportion of menhaden caught between Sandy Hook and Cape May?

Mr. PARSONS. No, sir. I can tell you better how much oil they catch; I do not figure on how much fish they catch. We figure on how many barrels of oil come to market. I can tell you how many barrels of oil are on the market to-day, and how many are held by manufacturers, and how much by dealers.

Senator SEWELL. Can you say whether the fish caught between Sandy Hook and Cape May are used for bait?

Mr. PARSONS. Yes, sir. Our Gloucester people have bought them down at Tiverton and at Block Island. They have gone there and waited a week to get the fish for bait to go on the George's fishing grounds.

Senator SEWELL. Menhaden that have been caught on the New Jersey coast?

Mr. PARSONS. On the New Jersey coast; they have been caught there and brought up that way.

Senator SEWELL. In a condition for bait after being caught in summer on the New Jersey coast?

Mr. PARSONS. If they have not been caught more than twelve hours they would be fit for bait, but if caught twenty-four or forty eight hours they would not be, and they are hardly fit for oil then.

Senator SEWELL. Do the fleet that fish on the Jersey coast and rendezvous north of Long Island take their products north?

Mr. PARSONS. I can not say. The factories located on the Jersey coast would not carry their products north of the Jersey coast to press out oil, but the factories located at Tiverton and those on Long Island would go south for the fish and would bring them to their factories to be pressed.

STATEMENT OF J. S. JOHNSON, OF BALTIMORE, MD.

Mr. JOHNSON. Mr. Chairman, I am engaged partially in the twine-netting business. That is only affected so far as the labor engaged in producing it is supplied by the materials obtained from the menhaden fishery. This bill would bring about the destruction of that great interest, and so affect the labor employed in the production of the material used for the nets. I have no statistics to show how many are employed in it, but 90 per cent. at least of the labor that is employed in the production of these nets and twine is that of women. My experience with them has been that it is the most patient and reliable labor we can get. They are principally girls, some of whom have others dependent on them. I do not know exactly how many are employed. There are probably between 500 and 1,000.

The CHAIRMAN. Seven or eight factories?

Mr. JOHNSON. There are seven or eight factories producing twine in the country. The menhaden fishery does not embrace the whole business of the factories, but it probably amounts to about one-half. The eastern men—the Gloucester and Boston men—probably use more of it than the others do. The labor on the other netting is about 90 per cent. of it women, and women who are dependent on their labor for support, and it is a class of labor that has no trades' unions and go on no strikes. They are reliable, and they are docked for every hour they lose. They work patiently for four to six dollars a week, ten hours a day. They will be affected, of course, if the destruction of this interest is brought about.

Senator DAWES. Can you state how much of the menhaden product in a year is used in the twine-netting business?

Mr. JOHNSON. I should think one-half comes from the menhaden fishery.

Senator DAWES. How much is the aggregate value?

Mr. JOHNSON. I have no means of telling. I have not considered the subject.

STATEMENT OF N. M. JURNEY.

N. M. JURNEY (of North Carolina) appeared.

Senator RANSOM. Mr. Jurney is here representing this interest in North Carolina; and we have also Mr. Chadwick here, who is one of the menhaden fishermen himself.

Mr. JURNEY. Perhaps I can give my information better by being asked as to the points you want to inquire about in connection with the various topics involved.

Senator RANSOM. Will you state the value of the menhaden fisheries in Carteret County, N. C., and that vicinity?

Representative SKINNER. There are few menhaden fisheries in North Carolina outside of Carteret County.

Mr. JURNEY. I suppose there are fifty to seventy-five boats employed in the business in Carteret County. Some of these boats are small, but many are quite large.

Senator RANSOM. How many people are engaged in the fishery?

Mr. JURNEY. Over 300.

Senator RANSOM. What is the amount of capital employed?

Mr. JURNEY. I should think at least $75,000. There are at least 200 families or more who are looking to this industry alone for a livelihood.

The poor people who live along the coast where they do not have very good soil to cultivate look to the water as a means of support, and they have invested everything that they can raise for small boats and seine nets, and they are employed by Mr. Chadwick and Mr. Jones, his partner, and by Dye Brothers, and they catch these fish and sell them, and support their families very well in that way.

Senator RANSOM. Do they make oil and guano there too from the fish?

Mr. JURNEY. Yes, sir; these factories manufacture the menhaden into oil and fish scrap.

Senator RANSOM. There is a great deal of other fishing going on there. That is a great fish country?

Mr. JURNEY. Yes, sir.

Senator RANSOM. In your judgment and the judgment of the people there, has this menhaden fishing interfered at all with the other fishing?

Mr. JURNEY. Not in the least. I have lived there six years myself, and the last four years without interruption, and I have no special interest in this matter. I am a minister of the Methodist Church, but I am very fond of fishing, and I should know if there was any objection to this menhaden fishing from any quarter whatever as a means of breaking up the sportsmen, for I belong to that class myself in a certain way. I built a boat myself for that purpose, and I will warrant that I have caught more fish trolling in North Carolina than any man in the State; and there have been more bluefish and more mackerel running there on the coast when there have been more of the menhaden. I have gone out there at times, and when the menhaden were more plentiful, and caught with a hook and line as high as 388 bluefish, averaging 2 pounds apiece.

Senator RANSOM. In that connection, let me ask Mr. Chadwick one question, because he is engaged in the business.

Mr. Chadwick, you have seen these menhaden caught in the nets. Will you give this committee some idea of the number of eatable fish that are taken up when you catch the mendaden?

Mr. JURNEY. Just let me finish and then let him come in. In all the catch of the menhaden there I do not know that I have ever heard any of the fishermen say that they have caught 40 fish that would be a palatable fish at all to eat.

Senator DAWES. Were the menhaden taken within 3 miles of the shore?

Mr. JURNEY. Oh, yes; within half a mile. It would annihilate the business entirely to prohibit such fishing within 3 miles of the shore. They might as well give up and go home. It means confiscation to all the property and turning loose three hundred people with no employment at all.

Senator SEWELL. Have you any personal knowledge of that fact?

Mr. JURNEY. I have. I know every man personally who is engaged in the fishery there.

Senator SEWELL. You do not find any fish outside the 3-mile limit?

Mr. JURNEY. I have never known a single catch beyond 2 miles of the coast.

Senator SEWELL. You stated to the committee that you caught more bluefish when the menhaden were on the coast than at other times?

Mr. JURNEY. I say that year before last, during the immense run of the menhaden, there were more bluefish and mackerel than at other times.

Senator SEWELL. Is it not true generally that the bluefish and the mackerel follow the menhaden?

Mr. JURNEY. I do not know that it is.

Senator SEWELL. Do you not know that they subsist on menhaden?

Mr. JURNEY. No, sir; I have no knowledge of it in the world. I have caught bluefish of excessive size, and I know they feed upon small fish. I have never yet found in a bluefish or mackerel any menhaden, and we have never known that any kind of fish feed upon them except the sharks; and there has never been the slightest complaint from any other fishing interest in North Carolina, and we have just as much there of the various kinds as you have anywhere. There has not been the slightest complaint from any enterprise there. Many sportsmen go down there. We have a watering place there, and a hotel that will accommodate a thousand guests, and three or four more that I suppose could take care of three thousand people. Quite a number of people from all the South and North come there. I think it is one of the finest places to troll on all the Atlantic coast, and there has never been the slightest complaint made from any source whatever about the menhaden fishery that ever I have heard; but to the people in that country, and especially the poorer class of people, who are looking to this interest for a livelihood and a support, this measure would be just the confiscation of everything.

Senator SEWELL. Do any northern people go down there to fish?

Mr. JURNEY. It is purely local. Opposite Beaufort and Morehead City we have as many as five whale fisheries, all of them full of men who have bought their guns to shoot bombs, and have lances and all the accoutrements necessary for the capture of whales, and if this bill passes it will destroy all their interest. The bill speaks of the "capture of fish to be manufactured into oil."

Senator RANSOM. Have you not written an article on the menhaden?

Mr. JURNEY. Yes, sir.

Senator RANSOM. If you can get a copy of that article, will you send it to the chairman of the committee?

Mr. JURNEY. If I can get a copy this evening and send it, I will do so.

Senator SEWELL. The bill is amended to allow 9-inch nets to be used.

Senator DAWES. They do not catch whales in nets?

Mr. JURNEY. It applies to any kind of fish caught for oil.

Senator SEWELL. It only prohibits fishing by nets.

Senator DAWES. There is a provision here that you can fish for any fish that will not go through a 9-inch net.

Mr. JURNEY. I did not notice that particularly.

Senator DAWES. That is, you may fish with a net of that size. It does not permit you to fish by other means, does it?

Senator SEWELL. It was never intended to prohibit the catching of large fish by any other means.

Mr. JURNEY. But the expression "or other appliances upon the high seas within 2 miles of the Atlantic coast, or in any arm of the sea, river," etc., I did not understand.

STATEMENT OF REPRESENTATIVE SKINNER.

Representative THOMAS G. SKINNER (of North Carolina) appeared.

Senator RANSOM. Mr. Skinner represents a district in which there is a great deal of fishing. It is the great fishing part of this continent,

if I may say so—the Pamlico and Albemarle Sounds and the eastern part of North Carolina. I would be glad to have Mr. Skinner state whether there is, on the part of other fishermen, the shad fishermen, the rock fishermen, the bluefish fiishermen, or the bass fishermen, any opposition whatever to the menhaden industry.

Representative SKINNER. I represent nearly all the water of North Carolina. I think if this bill were put to a vote in my district it would not get a single vote. There is some little objection to purse-net fishing in my State, but none to purse-net fishing for menhaden. The only objection we have to purse-net fishing is to purse net fishing in our inland waters for bass. We think that has a tendency to break up the breed.

I wish to say in connection with what some other gentlemen have submitted, that I have been a fisherman almost from my infancy; my father was a fisherman, and I was almost born on a fishing beach. My people have been always largely engaged in the shad and herring fishery. We catch in our district on the Albemarle Sound larger catches of shad and herring, I believe, than in any other part of North America; and it has always been the custom, at least we have always noticed that it has been the habit, of those fish to go and come. Sometimes for four or five years there will be a very small catch of herring, and then will come a tremendous glut of herring without any possible known cause. I remember in 1855, almost as far back as I can remember, that when there had been no menhaden fishing, when there never had been a menhaden caught in North Carolina, there came an immense glut of menhaden. They came all through our sounds. The other fish left. There was the smallest catch of herring that year and for three or four years afterwards that had ever been in North Carolina, but there was an immense glut of menhaden all through our sounds. They were not caught then, and were not caught for many years afterwards to be used for oil and scrap; but both since and before the menhaden have been caught for scrap they have come and gone, the shad have come and gone, the herring have come and gone, and all sorts of fish. The bluefish more especially have come and gone without any ostensible cause, no cause that we could find out. It certainly has not been affected by the menhaden fishing in our district.

I want to say, too, that I have seen the menhaden fish caught, not to a very great extent, because the part of the district I live in is not engaged in it much, but I have seen drafts of them come, and I never saw at any one time many edible fish caught in a draft of menhaden. I do not believe that they associate together. I do not believe there is any fish on our coast that live upon the menhaden as food. Now and then they may cut them up. I have seen bluefish in a gang of menhaden cutting them up, and you would think they were eating them, but I do not think they eat any of them. I have seen fifty or a hundred people fish with a troll-line, and have seen the fish cut open, but I have never seen a menhaden inside a bluefish. I have seen as many as five thousand large bluefish, weighing from 10 to 28 pounds, caught on our coast, and I have seen them cut up, and when menhaden, were all around them, and I have never seen a single menhaden come out of them. I do not believe they eat menhaden.

I want to say that in another part of my district establishments were put up the year before last and last year, and there is being more capital invested in it now at one point in my district, and fisheries for porpoises have been commenced, and this bill would annihilate that business also.

Senator SEWELL. It has been amended to cover that.

Representative SKINNER. The passage of this bill would throw out of employment many men in my district.

STATEMENT OF W. S. CHADWICK.

W. S. CHADWICK (of North Carolina) appeared.

Senator RANSOM. Mr. Chadwick, how many eatable fish have you seen come up when you have taken large hauls of menhaden?

Mr. CHADWICK. Very few; sometimes none. Sometimes we may get a peck or a half bushel in a haul of three or four hundred thousand. As a rule we never get any amount.

Senator DAWES. What kind of eatable fish?

Mr. CHADWICK. We get a perch sometimes, and what you call weakfish; we call it trout. Sometimes we get a trout; sometimes we may get a little tailor.

Senator RANSOM. Mr. Chadwick, do you represent those engaged in catching fish for food as well as those who catch menhaden?

Mr. CHADWICK. I do.

Senator RANSOM. You are in both businesses?

Mr. CHADWICK. Yes, sir.

Senator RANSOM. Have you any idea where the menhaden spawn?

Mr. CHADWICK. I have not.

STATEMENTS OF N. B. CHURCH, OF TIVERTON, R. I.

Mr. N. B. CHURCH. Mr. Chairman, I am a practical fisherman. I belong to Rhode Island, and am familiar with all parts of the coast. I am engaged in the menhaden fishery.

Mr. D. T. CHURCH. How is it on the Jersey coast? Do the hook-and-line fishermen come to you?

Mr. N. B. CHURCH. When we are there we always see the boats of the food fishermen. There were alongside of our steamer this fall as many as twenty boats at once. I asked them about this bill, and they said they were all opposed to it.

I have no general statement to make in regard to this fishing. I have engaged in the fishing for twenty-five years from the coast of Maine to the coast of South Carolina, and if there is any question you desire to ask in regard to it I can answer it.

Senator SEWELL. I should like to know what proportion of the fish caught on the New Jersey coast is caught within the 3-mile line.

Mr. N. B. CHURCH. I should say, roughly, ninety-nine one hundredths. Probably it would not be quite as much as that, but nearly.

Senator SEWELL. What proportion of the catch of the whole fleet is on the New Jersey coast now, taking last year?

Mr. N. B. CHURCH. The last year was very unfavorable on the New Jersey coast. The catch was very small. I think on the 1st of August or thereabouts the fish came from the south part of the New Jersey coast and went on to the New York coast. I do not think that during the months of August and September there were 5,000 barrels caught on the coast of New Jersey.

Senator SEWELL. How many steam vessels are engaged in the business?

Mr. N. B. CHURCH. I think seventy or eighty altogether on the coast. I do not know exactly.

Senator SEWELL. What is the tonnage of the vessels?

Mr. N. B. CHURCH. The tonnage I think runs up to the largest steamer, which is 125 tons.

Senator SEWELL. What is the capacity of that vessel in fish?

Mr. N. B. CHURCH. She carries 2,700 barrels of fish.

Senator SEWELL. Is that vessel ever full?

Mr. N. B. CHURCH. I have filled her twice.

Senator SEWELL. In how long?

Mr. N. B. CHURCH. In five hours.

Senator SEWELL. What is the capacity of your net at one time for a haul?

Mr. CHURCH. Two hundred and twenty-five feet in length, and from 80 to 100 feet in depth.

Senator SEWELL. How many fish have you caught at any one time at most?

Mr. N. B. CHURCH. Fifteen hundred barrels.

Senator SEWELL. From your practical knowledge of fishing, does it not destroy the fishing grounds of such fish, for instance, as sheepshead, to have these nets hauled over them?

Mr. N. B. CHURCH. In my experience in twenty-five years' fishing I never caught a dozen sheepshead in my life with a purse net or in any other way. I never caught a striped bass in my life with a purse net.

Senator SEWELL. I did not speak of catching them, but of disturbing their feeding grounds.

Mr. N. B. CHURCH. You ask for my opinion. From my own knowledge I know nothing about it.

Senator SEWELL. You have no knowledge, because you have not fished for them with hook and line, and have not located them in that way?

Mr. N. B. CHURCH. I have not.

The CHAIRMAN. In making a haul for menhaden do you get many other fish?

Mr. N. B. CHURCH. Very few; we do not get enough to eat, as a general run.

The CHAIRMAN. Of all kinds together?

Mr. N. B. CHURCH. All kinds together. When the bluefish strike the coast in the spring of the year we occasionally get some bluefish, but very few, and later in the season we do not catch fish enough to eat, and have to buy our fish for eating in the market.

The CHAIRMAN. If you should see a shoal of mackerel, would you not throw your nets for those?

Mr. N. B. CHURCH. No, sir. We very often see schools of drumfish out at sea, oftener at sea outside the 3 miles than we do of menhaden. We see them of tens of thousands of barrels in schools, but we never think of disturbing them. They are no good to us.

Senator SEWELL. Do they not yield fish oil?

Mr. N. B. CHURCH. We never tried it. I do not think there is any oil in them. There is no market for them whatever. I have caught schools of drum on the coast, but we never supposed they were valuable for food fish. We see them in the summer in quantities along the coast, but not to my personal knowledge. Two captains told me that oystermen in Prince's Bay offered them $100 each to set on their oyster beds and catch them, for they said they were destroying the oysters. We saw them on the Jersey coast, tens of thousands in a school.

Senator RANSOM. Of the drums?

Mr. N. B. CHURCH. Yes, sir; the school I caught were not edible fish, because we wanted a mess ourselves, and I picked out a nice looking

fish and cleaned it, but it was not edible; it was full of worms. I scaled and cut a dozen different fish, but they were full of worms half as large as my small finger.

Mr. D. T. CHURCH. What is the size of the net you use?

Mr. N. B. CHURCH. We use 2½-inch nets. The 8-inch net you spoke of, of course, would be no barrier whatever to the fish.

Senator DAWES. What kind of fish are caught in nets of that sort?

Mr. N. B. CHURCH. I think they use as large as that to catch porpoises.

Senator DAWES. Could not anything smaller than that be caught in such nets.

Mr. N. B. CHURCH. No, sir; fish about that size would go in.

Senator DAWES. How much would such a fish weigh?

Mr. N. B. CHURCH. From 2 to 5 pounds. There are several gentlemen here who can tell in regard to menhaden being necessary to the presence of bluefish. In 1884, the body of menhaden on the coast was on the coast of Rhode Island, and that was the year the bluefish was so plenty at Fire Island, and about there. The fish were caught in Rhode Island and brought to New York to be rendered. In 1885 the menhaden were eastward of here and the bluefish were off shore.

Senator DAWES. Have you observed in schools of fish moving east and those moving back south, whether there is any great difference in the quantity when they go one way or the other?

Mr. N. B. CHURCH. Generally the quantity seems the largest when they go south. I suppose that is accounted for because they nearly all start at the same time. In 1884 when they took the southern course the coast was a complete body for 25 miles off shore and in, according to the pilots. We were not out, but when they went out it was one solid body of fish going down the coast, and they were followed by a school of sharks, something that I never saw in my experience in fishing before, and I think there were millions of sharks in a school. I have no doubt that there were a million sharks in one large school that I saw.

Senator DAWES. Following the menhaden?

Mr. N. B. CHURCH. Following the menhaden.

Senator DAWES. Do you think they live on the menhaden?

Mr. N. B. CHURCH. I have no doubt about that. We have taken as high as 200 menhaden out of one shark. Those sharks were all the way from 6 to 14 feet long.

Senator DAWES. A million sharks. How many menhaden would they take?

Mr. N. B. CHURCH. That I do not know. Professor Baird can tell. We took as high as 200 whole fish out of one shark.

Senator STANFORD. How long will it take a shark to digest a fish like that?

Mr. N. B. CHURCH. I do not know. They are just as whole when we cut the shark open as when caught. Probably they are not a great while digesting.

The bill practically does away with fishing for another reason, which not many have stated. Take the fish that are off shore. Generally when they school off shore, which they do occasionally, they are driven there by sharks and driven up into very compact bodies, and the minute you inclose them in a net every shark goes for them and would tear the net all to pieces, and it would be impossible to save any fish.

Senator DAWES. So that off-shore fishing with nets for menhaden is not practicable then?

Mr. N. B. CHURCH. Not at all.

The CHAIRMAN. You speak of an immense body of menhaden going south, 25 miles in width. How long was that?

Mr. N. B. CHURCH. The first day we saw the fish they were at Coney Island, and the fishermen along the Jersey shore as far down as Squan said they were there, so that probably they were 25 or 30 miles long.

The CHAIRMAN. Then it was a large field of 25 miles square?

Mr. N. B. CHURCH. Yes, sir; that was the notice from the pilots. They said the fish were off shore. We did not see them. If we had had the facilities for catching them at that time, it was impossible to take them.

Senator DAWES. In all your fishing for menhaden what proportion of your catch has been outside of the 3-mile line on the Jersey coast? Of what you have done on the Jersey coast how much has been outside?

Mr. N. B. CHURCH. I think, I said about 1 per cent. Out of 100 99 per cent. were caught within that line, mostly within half a mile of the shore. I have fished a great deal on the Jersey shore, and I have been always very particular about the fishermen who entered the protests. When they came alongside I gave them *carte blanche* to get their fish, measure their own fish; take them, and pay me what they were worth. I asked them always to come and get what bait they wanted at any time, if they would not interfere with my business.

Senator DAWES. If they were left to themselves to do just as they pleased in what way would they interfere with your fishing?

Mr. N. B. CHURCH. They would take my time. If I had to measure the fish out and give them to them it would occupy my time.

Senator DAWES. They do not interfere with the catching of them?

Mr. N. B. CHURCH. Not at all.

Senator DAWES. Is there any complaint that you interfere with them?

Mr. N. B. CHURCH. They say not. I never have found a single instance in all my discussion with the fishermen on the Jersey coast where one of them made a statement but what he was directly opposed to any legislation in regard to menhaden.

Senator SEWELL. Where have you seen anybody on the Jersey coast?

Mr. N. B. CHURCH. All the way from Sandy Hook to Cape May. Most of the fishing on the Jersey coast is between Squan and the Highlands.

Senator SEWELL. Do you go ashore or do they come out to you?

Mr. N. B. CHURCH. They come out to us. I never go ashore. We meet a great many of them right off Long Branch.

Senator SEWELL. There are petitions to this committee from all along there, signed by three or four thousand persons.

Mr. N. B. CHURCH. I do not doubt it, but that is the answer they always give me. I have met hundreds of them in my experience in fishing, I do not know but thousands; and they all tell me they have no objection to our fishing.

STATEMENT OF EDWARD WILCOX, OF PROVIDENCE, R. I.

Mr. WILCOX. I am here to answer any questions that Senator Sewell has to ask in regard to this matter. I have fished on a steamer for twenty years or more, but I have fished more particularly on the Jersey coast for the last eight years.

Senator SEWELL. Have the menhaden increased or decreased during that period?

Mr. WILCOX. I do not see any appreciable difference either way.

Senator SEWELL. What time do you commence fishing?

Mr. WILCOX. Usually from the 1st to the 15th of May.

Senator SEWELL. Where do you strike the menhaden first?

Mr. WILCOX. One or two years I have caught them, say, half way from Sandy Hook to Fire Island. We usually catch the menhaden at the east end of Long Island in the spring of the year. We get them there before we do on the coast of New Jersey.

Senator SEWELL. How near the coast do you catch them?

Mr. WILCOX. Within half a mile, especially in the spring. In the spring they will not show in deep water at all.

Senator SEWELL. Do you fish near the inlets?

Mr. WILCOX. The inlets from the coast?

Senator SEWELL. From the ocean?

Mr. WILCOX. No, sir; not very near. We fish there, of course, when we do not in other places, but there is such a tide there that it capsizes our seine sometimes.

Senator SEWELL. Where is your depot to which you take the fish?

Mr. WILCOX. Barren Island.

Senator SEWELL. If you fish on the Jersey coast for menhaden, say at Seabright, when you pull up you take them to Barren Island?

Mr. WILCOX. Yes, sir.

Senator SEWELL. How long does it take to make that trip?

Mr. WILSON. About an hour and forty minutes to run over from Seabright or Highlands or along there. From the Iron Pier it takes me an hour and forty minutes to run to Barren Island.

Senator SEWELL. Do you know anything about the habits of the bluefish and sheepshead?

Mr. WILCOX. I presume I know just as much as any other person does. I have made it my study to try to learn the habits of the menhaden, and to understand where they spawn, and everything of that kind. In fact, Professor Baird several years ago furnished us with blanks, and thermometers to take the temperature of the water, the kinds of fish seen, and the quantity taken, the direction of the wind, etc., and any matter relating thereto, and I kept that for two years. I made my observations of the temperature of the water three times a day, and I did not know any more about them at the end of two years than I did before I commenced. Of course I have my surmises the same as any one else.

Senator SEWELL. You do not believe that any practical knowledge has been obtained of the menhaden?

Mr. WILCOX. Not at all; no practical knowledge.

Senator SEWELL. As to where they spawn?

Mr. WILCOX. As to where they spawn, I think it is in a great measure as Professor Baird testified before the Halifax commission. The bluefish disappear; where they go he says he does not know. They may go to the Mauritius or to the Canary Islands; he does not have any idea where they go. These fish come on the coast in the spring. In my observation I have had a very good chance to learn. One year they seem to come in on the Long Island shore from directly off shore, and they will be coming from a southeast course, when they will strike the shore, and it is natural for them to follow that shore in the spring. That we know, because I have fixed on them off Rockaway Beach today, and to-morrow they would be at Fire Island, a distance of 40 miles; perhaps they would go between sunset at night and daylight the next morning, and they would continue to go along, following that

shore on, and when they get to the east end of Long Island we do not know where they go. Sometimes I think they go off shore, but sometimes I think they go into Long Island Sound.

Senator DAWES. In your fishing experience off the Jersey coast what portion of the menhaden that you have taken has been within and what portion without the 3-mile line?

Mr. WILCOX. I have fished there eight years, and I do not remember but twice in the eight years of setting my seine 2 miles from the shore. I do not think in the whole eight years there were more than two instances of setting the nets outside of 2 miles. Of all the fish certainly ninety-nine hundredths are caught within a mile of the shore.

Much has been said of the effect on food fish. I have a little model here of a purse net as we use it. The tendency, in my opinion, of food fish, when disturbed, is to go to the bottom, and not to strike off in a horizontal direction as the menhaden do. If we go around a school of fish that have food fish under them, this is the style of a net we have [exhibiting]. This is about the sized net we use; this is $2\frac{5}{8}$ inches. but we use a $2\frac{1}{2}$ net generally. We have half of this in what we call a working purse. We see a school ot fish and surround it, but when we come together we have this arrangement [exhibiting]. This purse-net takes its name from the old-fashioned purse.

If you had an old-fashioned string purse you would see the principle exactly. You put in your thumb and finger to haul it up. Of course we can not have a man to go down in the water and hold it down, and we have a lead that will weigh about 180 pounds, and after we set the seine and draw these lines together [illustrating] with these other lines on the water we hook the blocks on in that manner [indicating], and this weight goes down and leaves all that up there. That is a purse-net. When dropped for food fish they will find that opening [indicating] ninety-nine times in one hundred; they will almost always find that opening and go through that. Menhaden will strike against the seine in this manner [indicating]. The sharks destroy the nets and cut the fish right through the twine. The shark will come along and take the twine, fish and all in his mouth. I have taken twenty-four menhaden out of one shark. The lead does not go on the bottom; sometimes we just let it go down two or three fathoms or one fathom, but it does not make any difference if that does go on to the bottom; just as soon as the menhaden strike the seine they will raise the whole thing, lead and all. I have seen the lead come into the boat—come in oftener than anything else—come clear up to the top of the water.

Senator STANFORD. What is the depth of the net?

Mr. WILCOX. On the Jersey coast, in that shoal water, we usually rate it about 90 feet. This is the size of net we use.

Senator STANFORD. The lower part of the net is never down below 100 feet?

Mr. WILCOX. Very seldom, though we can fish in shoal water with them just as well occasionally. We will set the nets on rocks where there is a large school of fish. We will run the risk of getting the nets torn. We send a small boat to hold this up until we surround them, for when the fish strike it they will raise this [indicating] right up. In my experience of taking menhaden it is very rarely we get any food-fish. We do occasionally get a bluefish or something of that kind; but as a general thing the sand-bottom food fish does not inhabit the sand bottoms. Menhaden we get on sand bottoms.

Mr. D. T. CHURCH. I should like to have the net spread out once more to give an idea. That seine is 1,800 feet long in the water and 100

feet deep. There are, say, 300,000 fish in the water. When they start they start horizontally. Every fish starts horizontally to escape. When they strike they strike their noses in one of the meshes, and they are caught by the thousands. This acts with the power of a steam engine almost. The menhaden run horizontally and strike the mesh. All the edible fish, such as the weakfish and others, naturally go to the bottom for protection, and as they run down we haul the seine right over them. That is the actual fact, and that is the reason we do not catch any more edible fish.

Mr. WILCOX. I have seen the time when schools of fish would strike the seine, that we had to make this purse-twine fast.

Representative SKINNER. Did you ever in all your life see a sheepshead caught in one of them?

Mr. WILCOX. I caught one once. That is all I ever caught. I have forgotten where it was, but I remember taking it. I am very curious to ask questions at times, and last fall I was off Seabright and one day the hook and line fishermen wanted bait. "Well," said I, "I understand that you are trying to get your Senators from this State to have a bill passed shoving us off and stopping our fishing altogether. I would not think you would come to us for bait in that case." They said to me, "Why, nothing of the kind. We have never signed for any such bill, and we do not want any such bill. We want you to come here to fish so as to catch bait for us." That was their statement. I do not know how many I asked, but I have talked with a great many of them down there in regard to that, and their statements to me were always—whether it has been through policy, thinking I would favor them in that way or not, I do not know—"We want you here so as to catch bait for us."

Senator DAWES. Do you think they come in in greater quantity for bait—that they gather the fish in there by your processes?

Mr. WILCOX. Do you mean whether the menhaden bring food fish in there any more?

Senator DAWES. Yes.

Mr. WILCOX. My experience has been that where bluefish are you will not find menhaden. The menhaden are to them the same as sheep would be to dogs. Wherever bluefish are you will not find menhaden if they can get away. The bluefish drive them right ashore.

Senator DAWES. Do the hook-and-line fishermen keep away from you?

Mr. WILCOX. Oh, we do not interfere at all; we do not clash.

Senator DAWES. They come around you?

Mr. WILCOX. Yes, sir; just as agreeable as can be.

Senator DAWES. What is the class of fishermen who are in favor of this bill?

Mr. WILCOX. I do not know who they are; that is something I do not know anything about. I have only talked with those whom I saw coming off there in boats. I had heard rumors that there was a feeling for such a bill among the fishermen. Those I talked with on the Jersey coast said what I have stated. If they saw us anywhere near in good weather they would come alongside.

Senator DAWES. So far as you know is it those who fish on dry land who are in favor of this bill?

Mr. WILCOX. That is my opinion. I honestly believe that to be the fact. I believe that the parties who complain are those who do not have any real interest in fishing.

Senator DAWES. You have observed the schools of menhaden that go north and the schools that go back south?

Mr. WILCOX. Yes, sir.

Senator DAWES. Is there any appreciable difference?

Mr. WILCOX. No; but, if anything, the schools are larger, more compact, I think, when they go south in the fall than they are when they move north. I should like to say a word in regard to that. Sometimes we will take fish at Sandy Hook in the fall of the year, and will follow them down to the Capes of the Delaware, and they disappear; that is the last we see of them; we can not find traces of them below that. More especially, if they are heavy with spawn, they seem to disappear and go to sea.

Senator RANSOM. May I interrupt you? Mr. Jurney tells me that the menhaden go up the coast in the spring, swimming up by North Carolina in March and April very thin and very poor, and in September and October they return, as you say, heavy with spawn and very fat indeed.

Mr. WILCOX. Yes, sir.

Senator RANSOM. His impression was that they went on down the coast towards the Gulf, but your idea is that they go to sea.

Mr. WILCOX. For this reason, that very often we have followed these fish along to the Capes of the Delaware one night, and to-morrow we would expect they would be going southward, and we would expect to find them further southward 40 or 50 miles, but when we came to look for them, we could not find them or catch any trace of them.

Senator RANSOM. But Mr. Jurney says they find them still in large quantities at Hatteras.

Mr. JURNEY. I have studied the matter a good deal, and when they first appear they appear to be coming up the coast from the south, of course; they are the shad species, and look very much like shad, and live by suction, as the shad does, and they look just like a shad does after it has spawned—very thin and very poor. When caught then perhaps they will not yield more than half a gallon to a thousand. In the fall, when our people fish for them, in September and October, and later on about the first of November, they are exceedingly fat, and yield all the way from six to eight gallons of oil per thousand. It seems as if they were almost in a condition to spawn. Then the course of the menhaden is southward. My supposition is that they spawn somewhere off the Gulf of Mexico.

Mr. WILCOX. I have thought that these fish in the spring of the year did come from the south, but if they come from that way it is a very singular thing always in the spring of the year fishermen take them at Montauk (that is 110 miles east of Sandy Hook) before we get them at Sandy Hook.

Mr. JURNEY. They may follow the Gulf Stream.

Mr. WILCOX. Perhaps; we do not know anything about them.

STATEMENT OF D. F. OVERTON, OF FAIRPORT, VA.

Mr. OVERTON. Mr. Chairman, I have been asked to appear here. I have no statement to make. I am willing to answer any questions that may be put to me. I am entirely unprepared to make any statement. I did not even know I was coming over until last night.

Senator RANSOM. Have you heard the statements made by these gentlemen in reference to the menhaden fishery, and are you acquainted with it, and would your general statement agree with theirs?

Mr. OVERTON. Yes, sir; their experience is mine.

The CHAIRMAN. How many people are interested in your vicinity in the menhaden business?

Mr. OVERTON. I can not answer that without some thought. I can say that there are about 25 nets; about 250 to 300 fishermen.

The CHAIRMAN. On a coast line how long?

Mr. OVERTON. That is in Virginia, south of the Potomac, 75 miles from the capes of Virginia. I am speaking of the Chesapeake Bay exclusively.

The CHAIRMAN. Within how many miles of coast line?

Mr. OVERTON. It is not on the coast line. On the bay we fish 30 miles either way, and in some instances we even go as far as the capes.

The CHAIRMAN. What would be the effect of this bill on that community?

Mr. OVERTON. It would be ruin entirely for me and a great many others situated as I am. Every dollar I have in the world is in the fish business. I am engaged in the food fishery and also in the menhaden fishery.

ADDITIONAL STATEMENT OF D. T. CHURCH.

Mr. D. T. CHURCH. In relation to the spawning, we can give our view of it. It was the generally received opinion in relation to the spawning of menhaden up to within four or five years ago, that they came full of spawn in the spring the same as other fish, but by investigating and taking evidence, by going and examining the fish for a number of years, we learn that the spawn in the menhaden are not found ripe until somewhere in October, November, or December, and when they disappear they disappear full of spawn and go into the open ocean, and that is the last seen of them in that condition. When they come back they are always empty of spawn, about the middle of next summer, in May or June. You will see in the open sea any amount of little menhaden. The evidence goes to show that the menhaden spawn in the open sea in the winter time.

Then there was another point you asked me that I did not quite apprehend in relation to the jurisdiction of the States in regard to this fishery. I will call your attention to the fact that in the treaty with Great Britain made in 1871 we gave to British subjects the right to come into any river, bay, or inlet of the United States. Now, if the United States had that right in relation to a subject of Great Britain, of course we have it.

Senator SEWELL. We gave them the same rights we gave our own citizens.

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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1518.

ARTHUR MANCHESTER, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

GEO. A. KING,
JAMES F. JACKSON,
Of Counsel.

STATEMENT OF THE CASE.

The plaintiff in error, a citizen of Rhode Island, was one of the crew of the steamer called the A. T. Serrell, which vessel was duly enrolled and licensed under the laws of the United States for carrying on the menhaden fishery. While the A. T. Serrell was in Buzzards Bay, and her crew were engaged in taking menhaden, she was seized and her crew were arrested for a violation of the statutes of Massachusetts. [These statutes are printed in full in the brief for Massachusetts.] The extent of Buzzards Bay is such that it is impossible to discern objects across from one headland to the other. The place where the crew were engaged in fishing was a mile and a quarter from the shore. In this act of fishing no fixed apparatus was used, and the bottom of the sea was not encroached upon or disturbed.

QUESTIONS ARISING AT THE TRIAL.

The questions arising at the trial were:

1. Whether the place was within the jurisdiction of Massachusetts.

2. Whether the plaintiff in error was not protected by the United States license.

3. Whether the plaintiff was liable if the act of fishing was not done within the body of a county as understood at common law.

4. Whether the laws of Massachusetts, prohibiting this method of fishing within three miles of the shore, were valid, especially as against said license.

These questions were raised by a request made to the Court to rule that the plaintiff in error could not be convicted for the reasons suggested in the said questions.

Record pp. 4, 5, 6.

ERRORS RELIED UPON.

The plaintiff in error claims:

1. That the place where the alleged offence was committed was a part of the high seas and was under Article III, Section 2, of the Constitution, which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction within the exclusive jurisdiction of the Federal Government.

2. That the place where the alleged offence was committed was not within the jurisdiction of Massachusetts.

3. That the plaintiff in error was authorized to do the act complained of by a license under Title L. of the Revised Statutes, and was protected by such license.

4. That the Statute under which the plaintiff in error was convicted, being Chapter 192 of the Acts of the year 1886, as construed by the Court, was invalid under the Constitution and laws of the United States, especially as against said license.

The Court ruled against each of these propositions, and the plaintiff in error assigns each of said rulings as error.

The rulings asked for in the Superior Court and the instructions given were as follows:

1. "The act complained of was on the high seas and without the jurisdiction of Massachusetts.

2. The act complained of having been done under a United States license for carrying on this fishery, the defendants cannot be held as criminals for violating a statute of this Commonwealth.

3. The defendants cannot be held unless the act complained of was done and committed within the body of a country, as understood at Common Law.

4. The statute of this Commonwealth prohibiting under a penalty the use of nets and seines and the taking of fish within three miles of the shore is invalid, especially as against a license to fish granted under the laws of the United States.

The defendant further asked me to rule that on all the evidence the defendant could not be convicted.

I declined to rule as requested by the defendant and submitted the case to the jury with the instruction that the statute of 1865 was repealed by the statute of 1886, and with the instruction that if they found that the defendant was engaged in using a purse seine for the taking of fish of any kind in that part of Buzzard's Bay which was within the jurisdiction of the Commonwealth of Massachusetts that they would be authorized to convict the defendant, and that the place where the acts of the defendants were committed, being within a marine league from the shore at low-water mark, was within the jurisdiction of the Commonwealth."

Record p. 6.

STATEMENT OF THE POINTS OF LAW.

1.

The Federal Constitution, Article III, Section 2, provides that "the judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors or public ministers and consuls; *to all cases of admiralty and maritime jurisdiction*," etc.

This admiralty jurisdiction extends wherever public navigation extends, and on the sea and in bays and arms of the sea unless they lie within *fauces terræ* where a man may reasonably discern between shore and shore, a state has no jurisdiction whatsoever.

Story on the Constitution, 1673.
Commonwealth *v.* Peters, 12 Met. 387.
United States *v.* Grush, 5 Mason 290.
Waring *v.* Clark, 5 How. 548.
Martin *v.* Hunter's Lessee, 1 Wheat. 304, 335.
Butler *v.* Boston & Savannah Steamboat Co., 130 U. S. 527.

It is entirely immaterial whether or not the soil under the sea is owned by individuals or by a state. Such ownership would not confer common law jurisdiction or affect the jurisdiction of the admiralty.

Regina *v.* Keyn, 2 L. R., Ex. Div. 63.
De Lovio *v.* Boit, 2 Gal. 398, 426.

The admiralty includes all matters relating to the fishery laws.

2 Browne's Civil Law and Admiralty, 463, 474.

In view of the foregoing authorities, it would seem clear that the place is out of the jurisdiction of Massachusetts, and that a law of that state can have no effect there. But—

2.

The steamer and her crew were acting under the authority of a license granted as provided in Section 4321 of the Revised Statutes.

There can be no doubt that the law providing for licensing fishing vessels extends to the place where the alleged offence was committed.

This Court in speaking of the law of limited liability say, "It is necessarily co-extensive with that of the general admiralty and maritime jurisdiction and that by the settled law of this country extends wherever public navigation extends on the sea and on the great inland lakes and the navigable waters connecting therewith."

Butler *v.* Boston and Savannah Steamboat Company.

As to the force and effect of a license, in Gibbons *v.* Ogden, 9 Wheaton 213, the Court say: "After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are 'license is hereby granted for the said Steamboat Bellona to be employed in carrying on the coasting trade for one year from the date hereof and no longer.' These are not the words of the officer. They are the words of the legislature and convey as explicitly the authority, the act intended to give, and operate as effectually as if they had been inserted in any other part of the act than in the license itself, * * * It (the license) certainly transfers to him all the right which the grantor can transfer to do whatever is within the terms of the license."

And see

Sinnot *v.* Davenport 22 How. 227, 241.
Foster *v.* Davenport, Ibid 244.
Gilman *v.* Philadelphia 3 Wall. 713, 738.

The provisions of the Revised Statutes concerning fishing licenses are authorized by the grant of admiralty and maritime jurisdiction.

See

The Genesee Chief *v.* Fitzhugh 12 How. 443.

In any view of the case it seems to be beyond all question, that the license authorized the crew of this steamer to fish for menhaden in Buzzards Bay, whether within or without the body of a county, and this being so the law of the State can have no force against this license.

3.

The statute on which this complaint rests, expressly undertakes to confer and the State Courts jurisdiction in admiralty. It not only provides for a criminal prosecution, but for proceedings *in rem* against the vessel engaged in fishing, and a suit *in rem* is now pending in Barnstable County. Such a suit has been held to be void.

Hine *v.* Trevor, 4 Wall, 555.
U. S. *v.* Burl & Hend. Co. Ferry Co. 21 Fed. Rep. 337.

4

The only case known to us which sustains the doctrine of the government is that of Dunham *v.* Lamphere, 3 Gray 268, decided in 1855.

That was a *qui tam* action under a statute of Massachusetts, prohibiting seining within one mile of Nantucket and the neighboring islands. The defendant was held to be liable under that statute. Chief Justice Shaw, in delivering the opinion of the Court says: "We suppose the rule to be that these limits extend a marine league, or three geographical miles, from the shore." The only cases referred to in this connection were:—

Commonwealth v. Peters, which was an indictment for an assault with a dangerous weapon on board a ship lying at anchor between Boston and Chelsea off Constitution Wharf, and

United States v. Bevans, which was an indictment for murder on the warship Independence, lying half a mile from Long Wharf in the harbor of Boston.

In connection with the proposition that the state owns and may control the fisheries on the coasts, the Chief Justice cites three cases: New Orleans *v.* United States, 10 Peters 662, which was a case relating to alluvial rights in the Mississippi at New Orleans; Pollard *v.* Hagan, 3 Howard 212, which was an action of ejectment relating to the soil under Mobile River; and Wilson *v.* Blackbird Creek Marsh Co., 2 Peters 245, which was an action of trespass where a vessel ran into a dam on Blackbird Creek in Delaware.

It is respectfully submitted that these cases do not sustain the proposition of the Chief Justice.

In Dunham *v.* Lamphere, the question of the admiralty and maritime jurisdiction was not argued at the bar or noticed by the Court.

We assert that this case stands alone in assuming common law jurisdiction over a crime committed on the high seas.

In Regina *v.* Keyn every judge except one (Lindley) who claimed that the Court could take cognizance of an offence committed at sea put the claim expressly on the ground of jurisdiction in admiralty.

5

But it is claimed that the Court has jurisdiction, under Chapter 1, Section 1, of the Public Statutes, which declares that "the territorial limits of this Commonwealth extend one marine league from its seashore at low water mark."

This act dates from 1859, and if it could be sustained, some of the results would be as follows :—

The Crimes Act of the United States was originally passed in 1790, and provides (Title LXX, Chapter 3, Section 5339) for the punishment of crimes committed on "the high seas or in any arm of the sea or in any river, creek, basin or bay within the admiralty and maritime jurisdiction of the United States *and out of the jurisdiction of any particular state.*"

This statute has been repeatedly held to apply to the waters on the coast which are not within the body of a county,

United States *v.* Wiltberger. 5 Wheat, 76.
United States *v.* Grush.
Commonwealth *v.* Peters.

and this whether within three miles of the shore or not.

"Another question has arisen, whether the offence if committed at all was in this case committed on the high seas. It appears that the vessel at the time of the supposed offence was lying outside the harbor of Newburyport, but within three miles of the shore. Under the circumstances we are clearly of opinion that the place where she then lay

was on the high seas; for it never has been doubted that the waters of the ocean on the sea coast without low water mark are the high seas."

United States *v.* Smith, 1 Mason 147.

And see

United States *v.* Kessler Bald. 15, 35.

If then the statute of Massachusetts is valid, it takes within the jurisdiction of the state a marine belt one league in width, and so displaces and nullifies the operation of the statute of the United States.

Again, the United States Government have, in the reciprocity treaties with Great Britain in 1854 and 1871, agreed, as one of the high contracting parties, "that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind, except shellfish, on the eastern seacoasts and shores of the United States north of the thirty-sixth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said seacoast and shores of the United States and of the said islands, without being restricted to any distance from the shore," etc.

Now if this statute of 1859 be valid, the state may legislate concerning the same locality over which the General government is exercising jurisdiction, and may deprive its own citizens and citizens of other states of privileges which the United States concedes to other nations.

And still further:

This statute and the Case of the Government assumes that Commonwealth owns these fisheries. If this is so the National Government has twice granted away state property without any permission from or conference with the State.

The United States government has expressly denied its power to make a treaty involving such a grant as in the negotiations preceding the treaty of 1842 with Great Britain respecting the north-eastern boundary line.

The Congress of the United States, by an Act approved February 28, 1887, made it a penal offence to land on the shores of the United States mackerel caught between the first day of May and the first day

of June, not excepting those caught within the three-mile belt. This certainly is not consistent with the proposition that the fisheries within this marine belt "fully and absolutely vest in the several states," and Congress must have undertaken to legislate concerning a matter which was beyond its control.

6

It is believed that in every case where a restrictive law of a state concerning its fisheries has been upheld against a United States license that the law related to shellfish imbedded in the soil, and that no case except Dunham *v.* Lamphere has maintained the right of a state to prohibit or restrict the catching of the free-swimming fish of the ocean anywhere within navigable waters.

The case of Macready *v.* Virginia, 94 U. S. 391, concerned the taking of shellfish *in the waters of Virginia.* The Court held that the state owned the bed of all tidewates *within its jurisdiction.*

Smith *v.* Maryland, 18 Howard 71, related to dredging for oysters *"in the waters of this state."*

In both cases it was assumed that the soil of the state was trespassed upon.

In that case Mr. Justice Curtis said: "This law is in terms limited to the waters of the state. If the County Court extended the operation of the law beyond those waters, that was a distinct and substantial ground of exception to be specifically taken and presented on the record, accompanied by all the necessary facts, to enable this Court to determine whether a voyage of a vessel licensed and enrolled for the coasting trade had been interrupted by force of a law of a state while on the high seas and out of the territorial jurisdiction of the state."

Geo. A. King
James F. Jackson
For Pl'f in Error

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

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STATEMENT OF THE CASE.

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STATEMENT OF THE CASE.

The plaintiff in error, a citizen of Rhode Island, was one of the crew of the steamer called the A. T. Serrell, which vessel was duly enrolled and licensed under the laws of the United States for carrying on the menhaden fishery. While the A. T. Serrell was in Buzzard's Bay and her crew were engaged in taking menhaden she was seized and her crew were arrested for a violation of the statutes of Massachusetts.

The place where the crew were engaged in fishing was a mile and a quarter from the shore. In this act of fishing no fixed apparatus was used, and the bottom of the sea was not encroached upon or disturbed.

The distance across Buzzard's Bay from headland to headland, disregarding the islands extending seaward from the mainland, is more than two marine leagues. The distance from the headland on the northerly side of the bay to the island of Cuttyhunk, the most westerly of these islands, is more than one and less than two marine leagues, a distance such that it is impossible to discern objects across the bay.

The place of the alleged offense was about a mile and a quarter off shore from the town of Falmouth.

Assignment of Errors.

That the court ruled and adjudged:

1. That the place where the alleged offense was committed was not a part of the high seas and was not, under article III, section 2, of the Constitution, which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, within the exclusive jurisdiction of the Federal Government.

2. That said place, notwithstanding said provision of the Constitution, was within the jurisdiction of Massachusetts.

3. That the plaintiff in error was not authorized to do the act complained of by a license under title L of the Revised Statutes and was not protected by such license.

4. That chapter 192 of the Acts of the General Court of Massachusetts for the year 1886, as construed by the court, was valid, notwithstanding the provisions of the Constitution and laws above cited or any provisions of the Constitution and laws of the United States.

I.

At the time of the treaty of Paris, in 1783, the territorial domain of England extended upon her coast to low-water mark, including all bays, harbors, and inlets within the "*fauces terræ*, where a man can reasonably discern from shore to shore."

Within these limits was "the body of the county." Within them the title to tide waters and the soil beneath was in the crown.

Without these limits were the "*high seas*," the common property of all nations. Over them England, as one of the common sovereigns of the ocean, had certain rights of jurisdiction and dominion derived from and sanctioned by the agreement of nations, express or implied.

Such jurisdiction and dominion she had for all purposes of self-defense and for the regulation of coast fisheries.

The exercise of such rights over adjacent waters would not necessarily be limited to a three-mile belt, but would undoubtedly be sanctioned as far as reasonably necessary to secure the practical benefits of their possession.

If self-defense or regulation of fisheries should reasonably require assumption of control to a greater distance than three miles, it would undoubtedly be acquiesced in by other nations.

The *marine-league* distance has acquired prominence merely because of its adoption as a boundary in certain agreements and treaties and from its frequent mention in text books. but has never been established in law as a fixed boundary

These rights belonged to England as a member of the family of nations, and did not constitute her the possessor of a proprietary title in any part of the high seas nor add any portion of these waters to her realm. In their nature they were rights of dominion and sovereignty rather than of property.

This question is very fully considered and the authorities examined in a recent case—

Regina *vs.* Keyn, 2 L. R., Ex. Div., 63.

In his opinion in this case Chief Justice Cockburn says :

"Now, it may be asserted without fear of contradiction that the position that the sea within a belt or zone of three miles from the shore, as distinguished from the rest of the open sea, forms part of the realm or territory of the crown is a doctrine unknown to the ancient law of England and which has never yet received the sanction of an English criminal court of justice."

The law of England was introduced and established in the colonies. The characteristic features of the property title of the crown in the seashore, with its limit at low-water mark, were recognized as distinguished from the peculiar rights of sovereignty called "*regalia.*"

Commonwealth *vs.* Alger, 7 Cush., 83.
Commonwealth *vs.* Roxbury, 9 Gray, 451.
Martin *vs.* Waddell, 16 Peters, 367.

The distinction between *high seas* and *tide waters within the body of the county* has been generally recognized.

Commonwealth *vs.* Peters, 12 Metc., 387.
United States *vs.* Grush, 5 Mason, 290.
1 Kent's Commentaries, 396.

Such, then, was the territorial domain and such the extra-territorial right of jurisdiction which Massachusetts possessed and could have exercised as an independent State when she adopted the Federal Constitution.

As an independent nation she could have undoubtedly enacted a statute like the one under discussion, which her own courts would have enforced and which other nations would have recognized.

II.

To what extent did she under the Constitution surrender this right of control over the fisheries of the ocean?

1. Whatever dominion or rights exist in the high seas are determined by international law and rest solely upon the common consent of nations, which may be express, but is more generally implied.

Whatever of such rights Massachusetts possessed previous to the formation of the Federal Government she possessed wholly by virtue of an agreement between herself as a nation and other nations.

When she became a State in the Union she not only on general principles merged her nationality in that of the United States, but by express concession she agreed to these clauses of the Constitution.

Art. I., section 10. "No State shall enter into any treaty alliance or confederation." "No State shall without the consent of Congress enter into any agreement or compact with another State or with a foreign power."

Thus Massachusetts was cut off from entering into such agreements with foreign nations as make up the body of international law. Not only could she enter into no new agreement, but the continuance of existing agreements and contractual relations was terminated.

"The law of nations is that collection of usages which civilized States have agreed to observe in their dealings with one another."

Lord Coleridge in Regina *vs.* Keyn.

When Massachusetts adopted the Constitution she gave up her international dealings and ceased to be a party to the usages and agreements by which they are governed.

The control over the fisheries of the ocean, resting as it

did upon such agreement and usage, was surrendered with the power to contract with other sovereign States.

This was not a surrender of territory that belonged to her, but of dominion over the common territory of the nations.

Her title to her own territory, as known and defined by law, she still retained.

"The States, as such, are not known in our intercourse with foreign nations and not recognized as common sovereigns of the ocean."

Story on the Constitution, sec. 1673.

"The Pacific Ocean belongs to no one nation, but is the common property of all."

Lord *vs.* Steamship Co., 102 U. S., 541.

Is every seaboard State of the Union one of these owners and the United States without such ownership?

Do these States have the right to take possession and control of the high seas as far as they shall see fit and assert each its own ideas and claims of right under international law and usage?

Are the inland States without interest or authority in this common ocean and what it contains?

It is certainly a subject of more or less disagreement between nations how far rights of dominion upon the sea extend, giving rise to various assertions and claims. No absolute limit has yet been fixed upon. Nothing more has thus far been settled than that these rights extend to at least three miles from shore.

It is difficult to believe that this question is one to be settled between foreign nations and each of the seaboard States dealing with one another as common sovereigns of the sea.

We contend, on the contrary, that rights over the waters adjacent to our coast and a part of the ocean, "the property of no one nation," are rights of dominion recognized and

established between nations by virtue of their national character and to determine international relations; that as such the merging of the national character by the several States into the United States by the adoption of the Constitution transferred by necessary implication and express provision the exercise of these rights.

2. Another clause of the Constitution is to be considered: "*The judicial power shall extend to all cases of admiralty and maritime jurisdiction.*" (Constitution, art. III, sec. 2.)

"We think it well settled that prior to the adoption of the Constitution of the United States the admiralty and maritime jurisdiction of the courts of Great Britain, so far as it was exclusive, was confined to the high seas, but within all bays, creeks, coves, basins, and harbors lying within the body of the county the admiralty and the courts of common law had concurrent jurisdiction."

C. J. Shaw in Com. *vs.* Peters, 12 Metc., 387.

"The high seas mean the waters of the ocean without the boundary of any county, and they are within the exclusive jurisdiction of the admiralty up to high-water mark when the tide is full."

1 Kent Com., 367.

"The admiralty and maritime jurisdiction is of the same exclusive cognizance, and it can only be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority that they can ever exercise a concurrent jurisdiction."

1 Kent Com., 397.

"But the waters of the ocean on the open coast are admitted on all sides to be without the limits of any county, and are within the exclusive jurisdiction of the admiralty up to high-water mark when the tide is full, and are deemed by the crown writers generally as the high sea or main sea."

United States *vs* Grush, 5 Mason, 290.

See also Story on Constitution, 1673.

This grant to the Federal head of the power to establish the only courts which had any jurisdiction whatever upon the high seas is only consistent with the view that the rights to be protected were national rights and should be enforced in national courts.

The distinction between the jurisdiction left in the States over localities within their territory, within the body of a county, and the jurisdiction transferred to the United States is clearly stated in Commonwealth *vs.* Peters, where the Chief Justice says: "Supposing the case stood upon the Constitution of the United States alone, without any legislation by Congress, the natural conclusion would be that the purpose of the Constitution was to transfer to the Government of the United States all the admiralty and maritime jurisdiction over cases, civil and criminal, which had been exercised in England by the courts of admiralty and the special commissioners for the trial of maritime causes, and that all other judicial power would remain to the State. This would leave the courts of the State all the jurisdiction of all cases occurring upon rivers and other places within the ebb and flow of the tide lying within the body of any county."

This clause is not to be construed as a "cession of the waters," but simply of jurisdiction. The State did not own the ocean and had no waters to cede.

Nor is it contended that the jurisdiction of a State is not "coextensive with its territory." Our argument is that the territory of Massachusetts was defined under the law of England, and that when she adopted the Constitution her domain was limited, as far as proprietary title is concerned, by the body of the county, in accordance with the established principles of that law.

It was *without this territory* that the offense with which Manchester is charged took place, in a locality where legislative control did not rest upon title in the soil and waters, but upon rights of sovereignty inseparably connected with

national character and which had always been exclusively entrusted to enforcement in admiralty courts. The transfer of the power to establish these courts, with their recognized exclusive jurisdiction over the high seas, was equivalent to the transfer of the right of control over those seas.

This view is in accord with the decisions of the courts. In all cases when the State courts have been held to have jurisdiction the locality has been admitted to be within the territorial boundaries of the State.

Within such boundaries the common-law courts of the State continue to have jurisdiction, the State continues to own her fisheries.

United States *vs.* Beavans, 3 Wheat., 387.
Smith *vs.* Maryland, 18 Howard, 71.

In the latter case Mr. Justice Curtis says "this power results from the ownership of the soil."

It is true that *within the tide waters of the State* "there has been no grant of power over the fisheries" to the United States.

McCready *vs.* Virginia, 94 U. S., 391.

That the State had no jurisdiction upon the ocean within three miles of shore was necessarily the decision of the court in the application of the Crimes Act of 1790 to an offense off Newburyport.

United States *vs.* Smith, 1 Mason, 147.
United States *vs.* Kessler, Baldwin, 15, 35.

Could Massachusetts, under chapter 289 of the acts of 1859, oust the United States of its jurisdiction?

The transfer of this exclusive jurisdiction over the high seas to the national courts was consistent with the true purpose of the Union. Such jurisdiction belongs to the Federal authorities for the best of reasons.

"*The criminal jurisdiction of the admiralty is, therefore, exclusively vested in the National Government*, and may be exercised over such crimes and offences as Congress may, from time to time, delegate to the cognizance of the national courts. * * * The States as such are not known in our intercourse with foreign nations and not recognized as common sovereigns of the ocean; and if they were permitted to exercise criminal or civil jurisdiction thereon there would be endless embarrassment arising from the conflict of their laws and the most serious dangers of perpetual controversies with foreign nations. In short, the peace of the Union would be constantly put at hazard by acts over which it had no control and by assertions of right which it might wholly disclaim."

Story on the Constitution, § 1673.

The admiralty jurisdiction of the United States, as compared with that of England, has been *extended* but never *abridged*.

"As the seas are the joint property of nations whose rights and privileges thereto are regulated by the law of nations and of treaties, such cases necessarily belong to national jurisdiction."

Ch. J. Jay Chisholm *vs.* Georgia, 2 Dallas.

The statement of Chief Justice Field in his opinion in this case that "we are unable to find any indication anywhere that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States" is an unsatisfactory reply to the argument. The presumption would be that the customary law of England was the law prevailing at this time in the States unless there were *evidence to the contrary*. Is there any evidence to be found that any other law as to territorial jurisdiction was adopted?

We submit, however, that the cases cited give evidence of clear recognition of this, which the statement seemingly ad-

mits to be, the customary law of England, as applied to State jurisdiction.

3. "*The Congress shall have power to regulate commerce with foreign nations and among the several States.*"

Fishing upon the high seas is in its nature an integral part of national commerce, and its control and regulation are necessarily vested in Congress and not in the individual States.

To secure the benefit of such national control and regulation of the fisheries was one of the express purposes of the Union.

"There are rights of great moment to the trade of America which are rights of the Union. I allude to the fisheries, to the navigation of the lakes, and to that of the Mississippi."

Hamilton in Federalist, Nov. 24, 1787.

In the Federal Convention debates it was claimed by Mr. Pinckney that there were "five distinct commercial interests: 1. The fisheries and West India trade, which belonged to the New England States."

Madison Papers, vol. III, p. 1450.

Governor Morris stated that "the fisheries and the Mississippi are the great object of the Union."

"The taking of fish is a very momentous concern; it forms a nursery for seamen, and this will be the source from which we are to derive maritime importance."

Fisher Ames in 1st Congress.

In the language of Mr. Gerry, "it is well known to be the best nursery for seamen; the United States has no other."

In the correspondence between Mr. Adams and Mr. Franklin in 1782 it was urged that the fisheries were essential to the Northern States and the Mississippi to the South-

ern and *both to all*, and that as a source of trade the fisheries were as important to the Southern States as to any.

John Adams' Works, vol. 3, p. 319.

The importance of fisheries to commerce from a national standpoint was discussed in the correspondence between Ralph Izard and John Adams.

John Adams' Works, vol. 7, p. 46.

See also the report of Mr. Jefferson, as Secretary of State, upon the resolution presented to Congress by the general court of Massachusetts.

Works of Thomas Jefferson, vol. 7, p. 538.

The fisheries of the ocean were viewed as of national importance as one of the principal sources of maritime power and of interstate and foreign commerce, and it was believed that one of the great benefits to be obtained from the Federal Union was to be *their control by a uniform law and protection by national authority.* The taking of fish in the ocean is an act necessarily bringing those engaged in it into contact with other nations. What is true of the simple act of navigation upon an ocean is still more true of fishing there.

"When, therefore, the Venturia went out from San Francisco or San Diego on her several voyages she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had agreed upon for the government of the vehicles of commerce occupying this common property of all mankind.

"True, she was not trading with others, but she was navigating with them and, consequently, with them was engaged in commerce."

Lord *vs.* Steamship Co., 102 U. S., 541.

Can there be any doubt, following such reasoning, that the control of the vessels engaged in taking menhaden upon the high seas is vested exclusively in Congress as a part of our external commerce?

The principles to be applied under this clause of the Constitution have been stated in many cases and very fully in a recent case—

Robbins *vs.* Shelby Taxing District, 120 U. S. 489.

Mr. Justice Bradley there says:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character or admit only of one uniform system or plan of regulation.

"When the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions, and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom."

It would seem to be free from doubt that the *ocean fisheries* or *coast fisheries*, as they are termed, are national in character and in importance.

They were so considered previous to and at the formation of the Constitution; they have been ever since a most important feature of national policy and occupied prominent position in our treaties; they "enter into the national policy, affect national rights, and may compromit the national sovereignty;" in the taking of the fish and in the navigation of the ocean they are inseparably connected with the interests of the country as a whole and its people as citizens of the United States; they constantly bring those engaged in this branch of commerce in contact with the rights and privileges of other nations.

That the welfare of these national industries requires one uniform system of regulation seems apparent.

Whether it be mackerel, cod, or menhaden fisheries, what more embarrassing and destructive of their proper conduct than to have twenty-two different systems of laws and regulations controlling the same industry along our shores?

Nothing is more certain than that the just regulation of different fisheries demands careful investigation into the facts relating to them, freedom from prejudiced and vexatious local legislation, and a protection that can only be secured from congressional control.

This question does not affect menhaden fisheries alone, but the mackerel, cod, and other fisheries as well. The fickleness and injustice of State legislation must always subject to the varying whims of local ignorance or prejudice an important industry, involving the outlay of a large amount of capital, upon which great commercial interests depend, an industry fruitful, too, of national blessing, in the building of ships and in the education of mariners.

Moreover, even if the subject-matter of ocean fisheries were deemed to be of such a nature that the States might make and enforce regulations thereof until the contrary intent of Congress appeared, the purpose of Congress to take this regulation into its own control has been plainly manifested.

Under its joint resolution of February 9, 1871, in establishing the Fish Commission, and under Title LI of the Revised Statutes, entitled "Regulation of the Fisheries," it has assumed the regulation of the coast fisheries in all such respects as are covered by the Massachusetts statute under which Manchester was convicted. It has made it the duty of the Fish Commissioner to investigate the facts and report whether any, and, if so, what, protective, prohibitory, or precautionary measures shall be adopted in the premises. This must have been done with a view of passing all such laws as should be necessary for the protection of the food fishes of the coast.

Again Congress took action in the enactment of chapter 288 of the statutes of 1887 relating to the mackerel fisheries.

It took action under the statutes relating to bounties, privileges, and agreements in 1792, in 1793, and in 1813, and in the granting of the license under which the plaintiff in error was fishing.

Whatever construction has been put upon such a license in cases where the rights of the licensee have been affected by State legislation, it has never been denied that such a license is a grant of authority, as held in

Gibbons *vs.* Ogden, 9 Wheat., 1.

When Congress enacted the law under which the plaintiff in error took out his license its power to regulate this fishery was exercised, and no prohibitory statute of a State could defeat his right to fish in the *high seas* under it.

In the case of Smith *vs.* Maryland, where such a license was considered, the locality was admittedly within the territory of the State and the State law was held valid under its right to protect its own territory and property.

In each of the cases relating to the regulation of shell fish the decision rests upon a state of facts in which it is conceded that the fish were within the territory and soil of the State.

We do not question the right of the State to regulate its own fisheries within its own soil or tide waters.

The United States has in her treaties with foreign powers several times disposed of these fisheries as though they belonged to her and not as though they were the property of the individual States.

Commerce with the nations is constantly concerned with them, either through rights and privileges determined by treaties or those determined by the general consent of the common sovereigns of the ocean.

The menhaden fishery, with all its ramifications, inseparably connected as it is with the food fisheries and markets

of the world, is practically destroyed by such legislation as that of Massachusetts, based upon an unjust discrimination and lack of such investigation as is being now carried on by authority of Congress.

It is the exclusion by the State of an important business connected with the commerce of the nations, authorized by national license, not from its own domain, where it might be claimed to be a matter of internal concern, but from the high seas, where it is necessarily a matter of external concern and carried on in contract with and together with all mankind.

JOSEPH H. CHOATE,
JAMES F. JACKSON,
Of Counsel for Plaintiff in Error.

of the world, is practically destroyed by such legislation as that of Massachusetts based upon an unjust discrimination and lack of such investigation as is being now carried on by authority of Congress.

It is the exclusion by the State of an important business connected with the commerce of the nations, authorized by national licenses, not from its own domain, where it might be claimed to be a matter of internal concern, but from the high seas, where it is necessarily a matter of external concern and carried on in contact with and together with all mankind.

Joseph H. Choate,
James F. Jackson,
Of Counsel for Plaintiff in Error.

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OPINION

OF THE

Supreme Judicial Court

of Massachusetts.

COMMONWEALTH

v.

ARTHUR MANCHESTER.

Opinion of the Supreme Judicial Court of Massachusetts.

COMMONWEALTH *v.* ARTHUR MANCHESTER.

FIELD, C. J. The defendant was complained of for taking fish by the use of a purse seine in the waters of Buzzard's Bay, within the jurisdiction of this Commonwealth. It appears by the report that the point in Buzzard's Bay where the seine was used "was within that part of Buzzard's Bay which the Harbor and Land Commissioners, acting under the provisions of section 2 of chapter 196 of the Acts of the year 1881, had, so far as they were capable of doing so, assigned to and made a part of the town of Falmouth;" that the distance between the headlands at the mouth of Buzzard's Bay is "more than one and less than two marine leagues;" and that "the distance across said bay at the point where the acts of the defendant were done is more than two marine leagues, and the opposite points are in different counties." The place "was about, and not exceeding, one mile and a quarter from a point on the shore, midway from the north line of" the town of Falmouth "to the south line" of said town. Buzzard's Bay lies wholly within the territory of Massachusetts, having Barnstable County on the one side and the counties of Bristol and Plymouth on the other. The defendant offered evidence that he was fishing for menhaden only with a purse seine, and that the bottom of the sea "was not encroached upon or disturbed;" "that it was impossible to discern objects across from one headland to the other at the mouth of Buzzard's Bay;" that he was a citizen of the

State of Rhode Island, and that the vessel upon which he was employed, and in connection with which he was using the seine, belonged to Newport, in that State, and had been "duly enrolled and licensed at that port under the laws of the United States for carrying on the menhaden fishery." It was contended at the trial, among other things, that the St. of 1886, c. 192, under which the complaint was made, had not repealed the St. of 1865, c. 212; but this has not been argued in this court. It is plain that the St of 1886, c. 192, was intended to regulate the whole subject of using nets or seines for taking fish in the waters of Buzzard's Bay, and that by implication it repealed the St. of 1865, c. 212, so far as that statute related to the taking of menhaden by the use of a purse seine in the waters of that bay. The principal question argued here is, whether the place where the acts of the defendant were done was within the jurisdiction of the Commonwealth of Massachusetts.

The Pub. Sts., c. 1, §§ 1, 2, are as follows: "SECTION 1. The territorial limits of this Commonwealth extend one marine league from its sea-shore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line. SECT. 2. The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof, subject to the right of concurrent jurisdiction granted over places ceded to the United States." The Pub. Sts., c. 22, § 1, contain the following provision: "The boundaries of counties bordering on the sea shall extend to the line of the Commonwealth, as defined in section one of chapter one." Section 11, of the same chapter, is as follows: "The jurisdiction of counties separated by waters within the jurisdiction of the Commonwealth shall be concurrent upon and over such waters." The St. of 1881, c. 196, which has been referred to, is as follows: "SECTION 1. The boundaries of cities and towns bordering upon the sea shall extend to the line of the Commonwealth, as the same is defined in section one

of chapter one of the General Statutes. SECTION 2. The Harbor and Land Commissioners shall locate and define the courses of the boundary lines between adjacent cities and towns bordering upon the sea, and upon arms of the sea, from high-water mark outward to the line of the Commonwealth, as defined in said section one, so that the same shall conform as nearly as may be to the course of the boundary lines between said adjacent cities and towns on the land; and they shall file a report of their doings, with suitable plans and exhibits, showing the boundary lines of any town by them located and defined, in the registry of deeds, in which deeds of real estate situated in such town are required to be recorded, and also in the office of the Secretary of the Commonwealth." Section 1 of chapter 1 of the General Statutes, contains the provisions which have been before recited as now contained in the Pub. Sts., c. 1, § 1, and c. 22, §§ 1, 11. These provisions were first enacted by the St. of 1859, c. 289. The Rev. Sts., c. 1, § 1, were as follows: "The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof; subject only to such rights of concurrent jurisdiction as have been or may be granted over any places ceded by the Commonwealth to the United States." The boundaries of the Commonwealth on the sea were first exactly defined by the St. of 1859, c. 289. The boundaries of the territory granted by the charter of the colony of New Plymouth, or of the territory included in the province charter, need not to be particularly set forth. Buzzard's Bay was undoubtedly within the territory described in those charters.

By the definitive treaty of peace between the United States of America and Great Britain, "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, . . . to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights

of the same and every part thereof." 8 U. S. Sts. at Large, 81. If Massachusetts had become an independent nation, there can be no doubt, we think, that her boundaries on the sea, as she has defined them by the statutes, would be acknowledged by all foreign nations, and that her right to control the fisheries within these boundaries would be conceded. It has often been a matter of controversy how far a nation has a right to control the fisheries on its sea-coast, and in the bays and arms of the sea within its territory; but the limits of this right have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than six geographical miles apart, have always been regarded as a part of the territory of the nation in which they lie. More extensive rights in these respects have been and are now claimed by some nations; but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast, and in bays within the territory, the headlands of which are not more than two marine leagues apart.

In the proceedings of the Halifax Commission, under the treaty of Washington, of May 8, 1871, where it was for the interest of the United States to claim against Great Britain, independently of treaties, as extensive rights of fishing as could be maintained, the claim was stated, in the answer on behalf of the United States, as follows: "It becomes necessary at the outset to inquire what rights American fishermen and those of other nations possess, independently of treaty, upon the ground that the sea is the common property of all mankind. For the purposes of fishing, the territorial waters of every country along the sea-coast extend three miles from low-water mark; and beyond is the open ocean, free to all. In the case of bays and gulfs, such only are territorial waters as do not exceed six miles in width at the mouth upon a straight line measured from headland to headland. All larger bodies of water connected with the

open sea form a part of it. And, whenever the mouth of a bay or gulf exceeds the maximum width of six miles at its mouth, and so loses the character of territorial or inland waters, the jurisdictional or proprietary line for the purpose of excluding foreigners from fishing is measured along the shore of the bay according to its sinuosities, and the limit of exclusion is three miles from low-water mark." (45th Congress, 2d session, House of Representatives, Ex. Doc., No. 89, p. 120.) The government of Canada had been instructed by the government of Great Britain, on April 12, 1866, "that American fishermen should not be interfered with, either by notice or otherwise, unless found within three miles of the shore or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839;" but afterwards the British government issued instructions "that the United States fishermen will not be for the present prevented from fishing except within three miles of the land, or in bays which are less than six miles broad at the mouth" (*ibid.*, pp. 120, 121). It is true that Mr. Dana, of counsel for the United States, contended, in argument with reference to the right to fish in the open sea, "that the deep-sea fisherman, pursuing the free-swimming fish of the ocean with his net or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser, though he approach within three miles of a coast, by any established recognized law of all nations" (*ibid.*, p. 1654). This contention, however, did not touch the right to fish in bays or arms of the sea, and it was not the claim actually made by the United States before the commission. This is stated in the answer and in the brief of the United States. The answer does not allude to any such position as that taken by Mr. Dana in his closing argument, but in the brief it is said: "Many authorities maintain that whenever, under the law of nations, any part of the sea is free for navigation, it is likewise free for fishing by those who sail

over its surface. But, without insisting upon this, the inevitable conclusion is that prior to the treaty of Washington the fishermen of the United States, as well as those of all other nations, could rightfully fish in the open sea more than three miles from the coast, and could also fish at the same distance from the shore in all bays more than six miles in width, measured in a straight line from headland to headland" (*ibid.*, p. 166).

The counsel for the defendant in the case at bar place much reliance upon the decision in *The Queen* v. *Keyn*, 2 Ex. D. 63. In that case the defendant was the officer in command of the Franconia, a German steamer, which, at a point "one mile and nine-tenths of a mile S.S.E. from Dover pier-head, and within two and a half miles from Dover beach," in the English Channel, ran down and sunk the British steamer Strathclyde, and one of the Strathclyde's passengers was drowned. The defendant was indicted in the Central Criminal Court for manslaughter. The question was whether the offence was committed within the jurisdiction of the admiralty, the Central Criminal Court having jurisdiction to hear and determine any offence alleged "to have been committed on the high seas or other places within the jurisdiction of the Admiralty of England," (p. 100). A majority of the court held that the offence was committed on the German steamer, and not on the British steamer; and that, under the laws then existing, there was no admiralty jurisdiction over an offence committed by a foreigner on a foreign ship on the open sea, whether within or without a marine league from the shore of England. In consequence of this decision, Parliament passed the St. of 41 and 42 Vict., c. 73. By that act it was declared that, "for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast, measured from low-water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

It is obvious that by this decision the court did not attempt to define the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only the extent of the existing admiralty jurisdiction over offences committed on the open sea. The courts of England would undoubtedly enforce any act of Parliament conferring upon them jurisdiction over offences committed anywhere. It is equally obvious that the decision has nothing to do with the right of control over fisheries in the open sea, or in bays or arms of the sea. The case contains a great deal of learning upon the respective limits of the common-law jurisdiction and of the admiralty jurisdiction in England over crimes, and upon the boundaries of counties in England under the laws then existing. These distinctions are immaterial in the case at bar, except with reference to the contention that the place where the acts complained of were done was within the admiralty jurisdiction of the courts of the United States. The boundaries of counties in Massachusetts may be defined by statute, and they may be made to extend over all the territory of Massachusetts, whether it be sea or land; and, if Massachusetts has a right to control the fisheries in Buzzard's Bay, offences in violation of the regulations which the State may establish can be tried in any of its courts upon which it may confer jurisdiction. It is to be noticed, however, that in all the citations contained in the different opinions given in *The Queen* v. *Keyn*, wherever the question of the right of fishery is referred to, it is conceded that the control to the extent at least of a marine league belongs to the nation on whose coasts the fisheries are. The argument of Mr. Benjamin, of counsel for the defendant, is not contained in the report of the case; but, from the statement of Mr. Justice Lindley, found on page 90 of the report, it seems that he admitted that the dominion of a State over the seas adjoining its shore existed for the purpose of protecting "its coasts from the effects of hostilities between other nations which may be at war, the protection of its revenue and of its fisheries, and the preservation of order by its police."

In the *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, 2 App. Cas. 394, it became necessary for the Privy Council to determine whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was a part of the territory of Newfoundland, and within the jurisdiction of its Legislature. The average width of the bay "is about fifteen miles," and the distance between the headlands is "rather more than twenty miles." Lord Blackburn, in delivering the opinion, says, at p. 416: "The question raised in this case, and to which their lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of Conception Bay above described. The few English common law authorities on this point relate to the question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the court of admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore." He cites the well-known language of Lord Hale: "That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discerne between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner," and comments upon its indefiniteness; and then cites the case of *Regina* v. *Cunningham*, Bell's Cr. C. 72, 86, and says that in this case, "this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words, within the territory of Great Britain." Apparently he was of opinion that, by most of the text-writers on international law, Con-

ception Bay would be excluded from the territory of Newfoundland, and that the part of the Bristol Channel, which in *Regina* v. *Cunningham* was decided to be in the county of Glamorgan, would be excluded from the territory of Great Britain; but he decides that Conception Bay is a part of the territory of Newfoundland, because the British government has exercised exclusive dominion over it, with the acquiescence of other nations, and it has been declared by act of Parliament "to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

We regard it as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish like lobsters, or fish attached to or imbedded in the soil. The open sea within this limit is of course subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on its revenue, exercise an authority beyond this limit. We have no doubt that the British Crown will claim the ownership of the soil in the bays and in the open sea adjacent to the coast of Great Britain, to at least this extent, whenever there is any occasion to determine the ownership. The authorities are collected in Gould on Waters, part 1, cc. 1, 2, and notes. See also *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135. *Gammell* v. *Commissioners of Woods and Forests*, 3 Macq. 419. *Mowat* v. *McFee*, 5 Sup. Ct. of Canada, 66. *The Queen* v. *Cubitt*, 22 Q. B. D. 622. St. 46 & 47 Vict., c. 22.

But it is argued that, if the fisheries of Buzzard's Bay are within the control of either the State of Massachusetts or of the United States, this control, by the Constitution of

the United States, is exclusively with the United States. The question is, therefore, whether the statutes of Massachusetts which have been cited are repugnant to the Constitution and laws of the United States. There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States. It is conceded that the case of *Dunham* v. *Lamphere*, 3 Gray, 268, is decisive of the case at bar if that case was correctly decided. That case was decided before the passage of the St. of 1859, c. 289, and the place where the acts complained of were done was not within a bay but in the sea within one mile of Gravel Island. Shaw, C. J., says, in the opinion: "Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the State, although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be, that these limits extend a marine league, or three geographical miles, from the shore; and in ascertaining the line of shore this limit does not follow each narrow inlet or arm of the sea; but when the inlet is so narrow that persons and objects can be discerned across it by the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet" (pp. 269, 270). He then proceeds to discuss the question "Whether the right of property and of dominion and government over the sea-coast fisheries, and all fisheries in tide-waters and arms of the sea, belong properly to the general government, or remain with the State government;" and he concludes that "in the distribution of powers between the general and State governments," "the right to the fisheries and the power to regulate the use of the fisheries on the coasts and in the tide-waters of the State" were left by the Constitution of the United States with the States, "subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic;" and he says, "That the exercise of both of these are not inconsistent, and therefore not in conflict with each other, was also settled by the

Supreme Court of the United States, in the case of *Wilson* v. Black Bird Creek Marsh Co., 2 Pet. 245."

In Dunham v. *Lamphere*, *ubi supra*, the defendant was a citizen of the State of Rhode Island, and the owner and master of a fishing vessel which had been duly licensed as a fishing vessel pursuant to the laws of the United States; but it is said that this license did not affect the question. We are asked to reconsider this decision mainly on the ground that the admiralty and maritime jurisdiction of the courts of the United States was not considered in the opinion. It has indeed been suggested that the recent decisions of the Supreme Court of the United States upon the power of Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes" (Const. U. S., Art. I., § 8), require that this decision be reconsidered; but no recent decisions of that court have been cited which relate to the regulation and control of the fisheries within the territorial tide-waters of a State, and the decisions of that court which relate to this subject are considered hereafter, and they do not appear to be in conflict with the decision in *Dunham* v. *Lamphere*. So far as we know it has never been decided anywhere that the regulation of the fisheries within the territorial limits of a State is a regulation of commerce; the decisions are, that the control of the fisheries is not included in the grant of power to Congress to regulate commerce. Gould on Waters, § 38. In all treaties and international relations the coast fisheries are regarded as a distinct subject from that of commerce. The argument addressed to us is that by the Constitution of the United States the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction" (Const. U. S., Art. III., § 2); that this power is exclusive; that the case at bar is within this jurisdiction, and that therefore the courts of Massachusetts have no jurisdiction over it. It must, we think, be considered as settled, that, if land on the coast be reclaimed from the sea, or if piers or wharves be extended

into the sea, such land and structures are a part of the territory of the State whose shores they adjoin. *Pollard* v. *Hagan*, 3 How. 212. *Weber* v. *Harbor Commissioners*, 18 Wall. 57. *Commonwealth* v. *Roxbury*, 9 Gray, 451. *Commonwealth* v. *Alger*, 7 Cush. 53. *Boston* v. *Richardson*, 105 Mass. 351. *Galveston* v. *Menard*, 23 Texas, 349. *Barney* v. *Keokuk*, 94 U. S. 324.

In *McCready* v. *Virginia*, 94 U. S. 391, it is said in the opinion that "the precise question to be determined in this case is, whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State, where the tide ebbs and flows, when its own citizens have that privilege. The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard* v. *Hagan*, 3 How. 212. *Smith* v. *Maryland*, 18 How. 71, 74. *Munford* v. *Wardwell*, 6 Wall. 423, 436. *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddell*, 16 Pet. 367, 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in

fact, a property right, and not a mere privilege or immunity of citizenship."

In *Smith* v. *Maryland*, 18 How. 71, 74, every question was discussed which arises in the case at bar except the question whether the place where the acts of the present defendant were done was within the territory of Massachusetts. In that case the plaintiff in error was a citizen of Pennsylvania, and owner of a sloop licensed to be employed in the coasting trade and fisheries, which was seized by the sheriff of Anne Arundel County in Maryland, while engaged in dredging for oysters in Chesapeake Bay, in violation of a statute of Maryland enacted for the purpose of preventing the destruction of oysters in the waters of that State. The questions presented and argued were, whether that statute was repugnant to the provisions of the Constitution of the United States, which grant to Congress the power to regulate commerce, or to those which declare that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, or which declare that the citizens of each State "shall be entitled to all privileges and immunities of citizens in the several States" Const. U. S., Art. IV., § 2. Mr. Justice Curtis, indelivering the opinion, says: "Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the declaration of independence. *Pollard* v. *Hagan*, 3 How. 212. *Martin* v. *Waddell*, 16 Pet. 367. *Den* v. *Jersey Co.*, 15 How. 426. But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish." He also says that the statute of Maryland does "not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and

by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the State to its own citizens, or a part of them, or by force of the Constitution of the United States must remain common to all citizens of the United States; whether the national government, by a treaty or act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the State holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case, and upon which we give no opinion." Upon the question of the admiralty jurisdiction, he says: "But we consider it to have been settled by this court, in *United States* v. *Bevans*, 3 Wheat. 336, that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution." He also held that it was not repugnant to the clause of the Constitution which conferred upon Congress the power to regulate commerce, and that the enrolment and license of the vessel conferred upon the plaintiff in error no right to violate the statute of Maryland. It is said in the opinion that "no question was made in the court below whether the place in question be within the territory of the State. The law is, in terms, limited to the waters of the State;" the question, therefore, did not arise "whether a voyage of a vessel, licensed and enrolled for the coasting trade, had been interrupted by force of a law of a State while on the high seas, and out of the territorial jurisdiction of such State." The dimensions

of Chesapeake Bay do not appear in the report of the case, but it has been said that this bay is "twelve miles across at the ocean." 1 Bish. Crim. Law, § 75. It is a bay considerably larger than Buzzard's Bay, and is not wholly within the State of Maryland, although at the point where Anne Arundel County bounds upon it it is wholly in that State. *Haney* v. *Compton*, 7 Vroom, 507. *Cornfield* v. *Coryell*, 4 Wash. C. C. 371. *Weston* v. *Sampson*, 8 Cush. 347. *Mahler* v. *Norwich & New York Transportation Co.*, 35 N. Y. 352. *United States* v. *Smiley*, 6 Sandf. C. C. 640.

The argument from the grant of judicial power to the United States in all cases of admiralty and maritime jurisdiction proceeds upon the theory that the jurisdiction thus granted is the jurisdiction as to subject matter and place, which courts of admiralty exercised in England when the Constitution was adopted; and that this is an exclusive jurisdiction, civil and criminal, which is fixed and cannot be changed by legislation. But in civil causes the jurisdiction both as to subject matter and place is not exactly that of the Courts of Admiralty of England at any time; and this jurisdiction can within certain limits be changed by Congress, and under the existing laws personal suits on maritime contracts or for maritime torts can be maintained in the State courts; and the courts of the United States, merely by virtue of this grant of judicial power, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States; and these statutes, so far as they have been passed under the grant of admiralty and maritime jurisdiction for the punishment of offences committed on the high seas or in bays and arms of the sea, have usually been confined to offences committed "out of the jurisdiction of any particular State." *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527. *The Belfast*, 7 Wall. 624. *The Eagle*, 8 Wall. 15. *Leon* v. *Galceron*, 11 Wall. 185. *Steamboat*

Co. v. *Chase*, 16 Wall. 522; S. C. 9 R. I. 419. *Schoonmaker* v. *Gilmore*, 102 U. S. 118. *Insurance Co.* v. *Dunham*, 11 Wall. 1. *Ex parte Byers*, 32 Fed. Rep. 404.

In each of the cases of the *United States* v. *Bevans*, 3 Wheat. 336, and of the *Commonwealth* v. *Peters*, 12 Met. 387, the place where the offence was committed was in Boston harbor; and it was held to be within the jurisdiction of Massachusetts, according to the meaning of the statutes of the United States which punished certain offences committed upon the high seas or in any river, haven, basin or bay "out of the jurisdiction of any particular State." The test applied in *Commonwealth* v *Peters*, which was decided in the year 1847, was that the place was within a bay "not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side," and was therefore within the body of a county. In *United States* v. *Bevans*, Marshall, C J., said: "The jurisdiction of a State is coextensive with its territory; coextensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States."

There are no statutes of the United States which, as we construe them, purport to regulate the menhaden fisheries on the coast or within the bays of Massachusetts. The rights granted to British subjects by the treaties of June 5, 1854, and May 8, 1871, to take fish upon the shores of the United States, had expired before the statute of Massachusetts (St. 1886, c. 192) was passed which the defendant is charged with violating. If the place where the offence charged in this case was committed is within the general jurisdiction of Massachusetts, then, according to the principles declared in *Smith* v. *Maryland*, the statute in question is not repugnant to the constitution and laws of the United States. The contention is that the jurisdiction of a State as between it and the United States must be

confined to the body of counties; and that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; and that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. We are unable to find any indication anywhere that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State. In *United States* v. *Bevans*, Marshall, C. J., in the opinion asks the following questions: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?" "As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws, of Massachusetts?" It would be a startling proposition that all persons who step into tide-water on the open coast of Massachusetts are while they remain there wholly beyond the jurisdiction of the State. The statutes of the United States define and punish but few offences on the high seas, and, unless other offences when committed in the sea near the coast can be punished by the States, there is a large immunity from punishment for acts which ought to be punishable as criminal. There are reasons, perhaps, why the States should not exercise in all respects the same authority over the open sea near the shore as over bays within their limits; and Congress or the

courts of the United States might refuse to recognize the right of a State by statute to extend its territorial limits beyond what is generally recognized as the territorial limits of States by the law of nations. Within these limits we think a State can define its boundaries on the sea and the boundaries of its counties, and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.

The statutes of Massachusetts, in regard to bays at least, make definite boundaries which before the passage of the statutes were somewhat indefinite; and, if it were necessary so to consider the statutes, they might well be taken to be a definition of the distance which a person can see, although the origin and history of the statutes has no connection with the English law concerning the boundaries of counties. It is to be noticed that Rhode Island and some other States have passed similar statutes defining their boundaries. Public Statutes of Rhode Island, 1882, c. 1, §§ 1, 2; c. 3, § 6. Gould on Waters, § 16 and note. The waters of Buzzard's Bay are, of course, navigable waters of the United States, and the jurisdiction of Massachusetts over them is necessarily limited (*Commonwealth* v. *King*, 150 Mass. 221), but we have no occasion to consider the power of the United States to regulate or control either by treaty or legislation the fisheries in these waters, because there are no existing treaties or acts of Congress which seems to us to relate to the menhaden fisheries within such a bay. The statute of Massachusetts which the defendant is charged with violating is in terms confined to waters "within the jurisdiction of this Commonwealth"; and it was passed, we think, for the preservation of the fish, and it makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. If there be a liberty of fishing for swimming fish in the navigable waters of the United States, common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be

considered as an impartial and reasonable regulation of this liberty; and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States. We see no error in the rulings at the trial, and there must be judgment on the verdict.

So ordered.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1518.

ARTHUR MANCHESTER,

PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH.

ANDREW J. WATERMAN,
Attorney-General.

HENRY C. BLISS,
Asst. Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1518.

ARTHUR MANCHESTER, *Plaintiff in Error*,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH.

The defendant is charged with the violation of Chap. 196 of the Acts of 1886, which provides that "no person shall draw, set, stretch or use any drag net, set or gill net, purse or sweep seine of any kind for taking fish, anywhere in the waters of Buzzard's Bay, within the jurisdiction of this Commonwealth," etc., with certain exceptions not necessary to be stated herein. By the findings of the Court the alleged offence was committed at a point about a mile and a quarter westerly of the shore line of the town of Falmouth, in Buzzard's Bay, as shown by the map which accompanies the papers. Buzzard's Bay is a body of water extending within certain headlands which are less than two and more than one marine league apart; the defendant was, at the time stated, engaged in taking fish called menhaden with a purse seine on or with a vessel which was duly enrolled and licensed under the laws of the United States for fishing. (Copy of Acts in appendix.)

Territorial Limits of the Commonwealth.

Pub. Stats., Chap. 1, Sects. 1 and 2. The territorial limits of this Commonwealth extend one marine league from its seashore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to a shore line.

Sect. 2. The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof; subject to the rights of concurrent jurisdiction granted over places ceded to the United States.

Property and Jurisdiction to the Extent of a Marine League.

The rule of law on the question of jurisdiction and property of the sovereignty beyond the line of the shore is embodied, with concurrence of text writers, in the proposition *terræ dominium finitur ubi finitur armorum vis*. Since the introduction of firearms the distance has usually been recognized to be a marine league, or three miles from the shore; and, in cases where an arm of the sea extends into the land, the jurisdiction of the sovereignty of the mainland extends over such water, providing the distance between the headlands is less than two marine leagues.

The claim to dominion in tide waters has been asserted by nations from the remotest period. Venice claimed the Adriatic; Genoa claimed the Ligurian Sea; Denmark a portion of the North Sea. The kings of Portugal, according to Vattel, once arrogated to themselves the seas of Guina and East India, and Spain made a similar claim toward the west.

In the time of Charles II., the judge of the Admiralty Court asserted the king's sovereignty within the four seas.

These indefinite claims, which at first were asserted with arrogance, had, to a limited extent, a reasonable foundation, and to that degree they became at last recognized among nations. The right of limited dominion on shore waters may arise by implication or assertion; if by assertion, the Court is not vexed with the insufficiency of the ruler's reason. Whether or not the political sovereignty has the moral right to take or the physical power to keep does not concern the tribunal that administers the law.

The Act of 41, 42, Vic., Chap. 73, within the purview of the statute, permanently and completely disposed of the abstract question discussed in Queen *v.* Keyn, so far as the British courts are concerned.

In Direct United States Cable Company *v.* Anglo-American Telegraph Company, 2 App. Cases, 394, the court held that Conception Bay, which has an average width of fifteen miles, is part of the territory of Newfoundland, because the British Government *has exercised exclusive dominion* over it, with the recognition of other nations, and *because it has been declared by act of Parliament to be part of the country* and made subject to the legislation of Newfoundland. The decision in Queen *v.* Keyn would hardly be expectad to embarrass the British Government in the maintenance of her asserted rights to the pearl fisheries of Ceylon, twenty miles from shore, which she has enjoyed for profit ever since her acquisition of it.

It is claimed herein, at the outset, that the right to dominion over the three-mile belt, and the right of property in the shore fisheries, have been so distinctly asserted by

the sovereignties of this country, that we are not obliged to resort to the abstractions of international law.

Grotius (De Jure Belli et Pacis, Lib. II., Cap. 2, Sect. 13) expresses an opinion that while no right could be acquired to the exclusive possession of the ocean, an exclusive right might be acquired in a particular part adjoining an individual State. Albericus Gentilis extends the distance to one hundred miles; Baldus and Bidinus to sixty. (Cockburn, C. J., in Queen *v.* Keyn.) Loccenius (De Jure Maritimo, Cap. 4, Sect. 6) puts the limit at two days' sail. Valin, in his Commentary on the French Ordinances of 1861 (Chap. V.), would have the control reach as far as bottom could be found with a lead line. Puffendorf (Lib. IV., Cap. 2, Sect. 8, De Jure Naturæ et Gentium) treats the sea adjoining the land as an accessory to the latter. This author refers to the sixty-mile limit of Baldus and Bodin. Casaregis (Discursus de Commercio, Sect. 136) asserts that the sovereign of the coast has an equal sovereignty over the sea to an extent of one hundred miles, and criminal jurisdiction over all the offenders, and asserts that the sovereign has not only the power of imposing tolls and dues on passing ships, but also that of prohibiting ships from passing through his waters. Bynkershoek (De Dominio Maris) observes: *Unde dominium maris proximi non ultra concedimus, quam e terra illi imperari potest.*

It is said that this is the first suggestion of a cannon-shot measure of territorial dominion over the sea. Hubner (De la Saisie des Batimens Neutres) speaks of the near sea as an accessory of the land; Vattel (Droit des Gens, Sect. 288) speaks of the rights of a nation to extend its dominion over the sea "as far as is necessary for its safety, or it

can make its power respected," and adds that no one can navigate the adjoining waters against the will of the sovereign. He further says, "that the nation cannot refuse access to ships not suspected or making innocent use of its waters without a violation of its duty," and adds, "It is true, it is for the nation to judge of what it shall do in a particular case; if it determines wrongly, it errs, but the others must put up with it." Vattel also approves the cannon-shot rule of distance.

The writer of the article "Mer," in "Repertoire de Jurisprudence," asserts that every sovereign is entitled to forbid commerce from approaching within a certain distance, which he intimates has been fixed by treaties of peace of commerce at two leagues. Moser (Versuch des Neusten Europäischen Völkerrechts, Vol. V., page 486) asserts the same principle and says, "The sea which borders on the coast of a country is indisputably, according to the law of nations, under the sovereignty of the adjoining lands so far as a cannon shot will reach." Lampredi (Public Jur. Theor., Vol. 2, page 65) assimilates the adjoining water absolutely to the land as to property rights and dominion "*in ejus imperio et dominio.*" Galiani, 1782 (De' Doveri de' Principi Neutrali), extends the control of the land sovereign to such a distance as the magistrates can, by fear of the powers confided to them, cause their decrees to be obeyed. Martens, 1778, asserts the right of a nation to such portions of the neighboring sea as is capable of being held from the shore, and adopts the cannon-shot rule of distance. M. Reyneval (Institutions du Droit de la Nature et des Gens, Liv. 2, Chap. 9, Sec. 10) makes the horizon the boundary of the territorial sea. Schmalz, a professor of law at University at Berlin, says,

the sovereignties of this country, that we are not obliged to resort to the abstractions of international law.

Grotius (De Jure Belli et Pacis, Lib. II., Cap. 2, Sect. 13) expresses an opinion that while no right could be acquired to the exclusive possession of the ocean, an exclusive right might be acquired in a particular part adjoining an individual State. Albericus Gentilis extends the distance to one hundred miles; Baldus and Bidinus to sixty. (Cockburn, C. J., in Queen *v.* Keyn.) Loccenius (De Jure Maritimo, Cap. 4, Sect. 6) puts the limit at two days' sail. Valin, in his Commentary on the French Ordinances of 1861 (Chap. V.), would have the control reach as far as bottom could be found with a lead line. Puffendorf (Lib. IV., Cap. 2, Sect. 8, De Jure Naturæ et Gentium) treats the sea adjoining the land as an accessory to the latter. This author refers to the sixty-mile limit of Baldus and Bodin. Casaregis (Discursus de Commercio, Sect. 136) asserts that the sovereign of the coast has an equal sovereignty over the sea to an extent of one hundred miles, and criminal jurisdiction over all the offenders, and asserts that the sovereign has not only the power of imposing tolls and dues on passing ships, but also that of prohibiting ships from passing through his waters. Bynkershoek (De Dominio Maris) observes: *Unde dominium maris proximi non ultra concedimus, quam e terra illi imperari potest.*

It is said that this is the first suggestion of a cannon-shot measure of territorial dominion over the sea. Hubner (De la Saisie des Batimens Neutres) speaks of the near sea as an accessory of the land; Vattel (Droit des Gens, Sect. 288) speaks of the rights of a nation to extend its dominion over the sea "as far as is necessary for its safety, or it

can make its power respected," and adds that no one can navigate the adjoining waters against the will of the sovereign. He further says, "that the nation cannot refuse access to ships not suspected or making innocent use of its waters without a violation of its duty," and adds, "It is true, it is for the nation to judge of what it shall do in a particular case; if it determines wrongly, it errs, but the others must put up with it." Vattel also approves the cannon-shot rule of distance.

The writer of the article "Mer," in "Repertoire de Jurisprudence," asserts that every sovereign is entitled to forbid commerce from approaching within a certain distance, which he intimates has been fixed by treaties of peace of commerce at two leagues. Moser (Versuch des Neusten Europäischen Völkerrechts, Vol. V., page 486) asserts the same principle and says, "The sea which borders on the coast of a country is indisputably, according to the law of nations, under the sovereignty of the adjoining lands so far as a cannon shot will reach." Lampredi (Public Jur. Theor., Vol. 2, page 65) assimilates the adjoining water absolutely to the land as to property rights and dominion "*in ejus imperio et dominio.*" Galiani, 1782 (De' Doveri de' Principi Neutrali), extends the control of the land sovereign to such a distance as the magistrates can, by fear of the powers confided to them, cause their decrees to be obeyed. Martens, 1778, asserts the right of a nation to such portions of the neighboring sea as is capable of being held from the shore, and adopts the cannon-shot rule of distance. M. Reyneval (Institutions du Droit de la Nature et des Gens, Liv. 2, Chap. 9, Sec. 10) makes the horizon the boundary of the territorial sea. Schmalz, a professor of law at University at Berlin, says,

"The parts of the sea which bathe the coast have always been considered to be the property of the country which they bound as far as the defence of the shore can extend." He admits the arbitrary rule of three marine leagues. Kluber (Droit des Gens Modernes, Part II., Title 2, Sec. 130) "To the maritime territory of a state belong the maritime districts or waters capable of exclusive possession." The "extent of the shore at all events, according to generally received opinion," is a cannon-shot distance from shore.

Pascal Fiore (International Law, Vol. I, page 370, Italian) adopts the proposition as to control over the adjoining waters, without defining the extent. He says every nation has a *dominion utile* on the sea which washes its shore in the interests of its preservation; it exercises besides a right of jurisdiction and police in the interest of its defence. MM. Pistoye and Duverdy (Traité des Prises Maritimes, Tit. 2, Chap. III., Vol. 1, page 93) say: "From the coast each power can in a given zone measured by the range of a cannon shot impose its laws and enforce obedience to them." They add that there is such a constant dominion that these territorial waters are under the immediate police of the local government, in the same manner as each state is master of the rivers, lakes and channels which pass through its territory. M. Hautefeuille (Historie des Origines des Progres et des Variations du Droit Maritime, page 197) says: "High seas cannot be possessed exclusively. The part of the sea which touches the coast may be defended by the riparian and kept under his subjection; he can show out foreign vessels or admit only such as he pleases." He further says: "The products of the sea are not inexhaustible and require to be kept under proper regulation. Hence the

adjoining sea may be possessed and considered as an accessory of the shore." Hallack on International Law, Chap. VI., Sect. 13, says: "The general usage of nations superadds to this maritime territory an exclusive territorial jurisdiction over the sea for the distance of one marine league, or the range of a cannon shot along all the shores or coasts of a state."

He says further, "even beyond this limit states may exercise a qualified jurisdiction for fiscal and defensive purposes." Von Kaltenborn, in Private Maritime Law of Europe, says: "for a period of two hundred years both in theory and practice that the litoral sea, so far as a cannon shot will reach, belongs to the maritim eterritory of a nation." M. Calvo (Droit International, Liv. V., Sects. 199–201) questions the right of separate property in the marine belt, but admits the right of surveillance and jurisdiction in the interest of the owners' defence or the protection of their fiscal interest. It is, therefere, he says, "in the nature of things that this should extend as far as its existence can be justified, but should terminate where all fear of real danger, or its public usefulness, or the possibility of defence ceases."

Signor Foramiti, in L'Avvocato Marittimo, says: "The waters which bathe the coast and shores of a state form its natural boundary; for the more effectual protection and defence of which the general usage of nations allows an imaginary line to be traced upon the sea at a convenient distance from the shore, and adapting itself to the formation of the latter, which line must be considered as the artificial maritime boundary of the state. Every ship which is found within this line must be considered as in the waters of the state of which it bounds the sovereignty and jurisdiction, and those

on board must conduct themselves as though they were on the shore, doing nothing which the government has a right to prohibit as prejudicial to the property or safety of the nation.

In M. Ortolan (Diplomatic de la Mer, Liv. 2 Chap. 8), referring to the "nature of the right which the nation owning a coast can claim over it," says "it cannot assert a right to prevent ships from passing in front of its shores or declare the territorial sea closed, as it might do in respect to one of its ports." It cannot impose tolls on passing vessels, as in a water belonging to itself, except so far as indemnity for works for the benefit of navigation, or for special services rendered, but he admits a right of a country to protect itself in regard "to safety, prosperity and individual interests."

Chancellor Kent says: "The three-mile limit is recognized by the United States in the law which gives the District Court jurisdiction in cases of capture within a marine league."

He also says: "All that can be reasonably asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end."

He adds: "According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as a cannon shot will reach, and no farther."

Bishop on Criminal Law, Book IV., Chap. 5, Sect. 74, says: "A nation bordering on the sea can hold actual possession of it as far from the shore as cannon balls will reach."

Coke (Littleton, 439) says: "If a man be upon the sea of England he is within the liegence of the King of England, or of his Crown of England."

Selden (*Mare Clausen*), and Bacon, 1 Abr. 640, are in accord with Coke.

Blackstone, Vol. 1, page 110, "The main or high seas are part of the realm of England."

Wheaton (International Law, 255) adopts the three-mile rule.

The question comes up distinctly in the case of "The Ann" (First Gallison, 62). The controversy was as to whether or not the vessel had broken a statutory embargo. It seems that the vessel arrived within three miles of the shore and then departed for an outlying post. Judge Story held that, being within three miles of the shore, she was within the acknowledged jurisdiction of the United States, and although she came not within the harbor but anchored in the open sea off Newburyport, and sailed thence outward, she broke the embargo and was liable to forfeiture.

The same proposition of law was recognized in the English case of the "Leda" (Swa. Adm. 40).

See also General Iron Screw Co. *v.* Schurmannus, 1 J. & H. 193.

Chief Justice Marshall, in Church *v.* Hubbard, 2 Cranch, 234, thus states the law: "The seizure of a vessel within range of its cannon by a foreign force is an invasion of its territory, and is a hostile act which is its duty to repel."

Under this rule, where land is reclaimed from the sea and where piers and wharves are projected into such waters, the lands and structures thus formed "are part of the State whose shores they adjoin," as observed by the Chief Justice in the court below: —

See

Pollard *v.* Hagan, 3 Howard, 212.
Webber *v.* Commissioners, 18 Wall. 57.
Barney *v.* Keokuk, 94 U. S. 324.
Commonwealth *v.* Roxbury, 9 Gray, 451.
Commonwealth *v.* Alger, 7 Cushing, 53.
Boston *v.* Richardson, 105 Mass. 351.
Mayor *v.* Menard, 23 Texas, 349.
McCready *v.* Virginia, 94 U. S. 391.

Special Concession as to Fisheries.

A distinction is made in the power thus ascribed to the shore sovereign, between a usufructory right and a proprietary right, between dominion and ownership. It is not our intention to attempt to define the limit of the power, for the purposes of this case it is only necessary to establish the proposition that the shore fisheries are within those conceded. We mean powers conceded by text-writers and asserted by jurists.

It is to be noticed that, very generally, the near-shore *fisheries* are conceded to the local sovereignty even where absolute proprietorship is questioned by the jurists. Wolff in *Jus Gentium* gives to the shore state the use of the adjoining sea to the extent of the fisheries and the collection of such things as the sea produces. Pascal Fiore (International Law, Vol. 1, page 370) allows to every nation a *dominium utile* on the sea which washes its shore, which, he says, includes fishing. Prof. Heffter (Public International Law of Europe, Sect. 75) concedes to the state the power of making regulation in respect to fishing.

Manning (Law of Nations, page 119) gives as one of the purposes for which jurisdiction and dominion have been recognized the regulation of fisheries.

He further says "the safety and order of the State are so manifestly interested in this particular that the usual measure of cannot shot is not always considered as sufficiently extensive in case of gulfs and bays. The State is entitled to extend measures necessary for the protection of its territory and its laws to these portions of the sea and to make regulations of police with reference to navigation and fishing."

So also M. Massé (Le Droit Commercial dans ses rapports avec le Droit Civil, Book II., Tit. II., Art. 105) gives to the local sovereignty the right of fishing in the adjoining sea, which right, he adds, "is confined to the inhabitants of the coast."

Hale (De jure Maris, Cap. 14) speaks of the right of fishing in the sea and creeks and arms thereof as originally lodged in the Crown. He further says, "Every nation has a right of police and of jurisdiction over the part of the sea which borders on its coasts, and makes in some sort a part of its territory. The right of property is burdened with a natural servitude for the benefit of navigation. It is otherwise in respect of the right of fishing, which is confined to the inhabitants of the coast."

Gould, in his note on the Franconia case, page 24, observes that the above passage was noticed and apparently approved in Regina *v.* Keyn.

In Gammell *v.* Commissioners of Woods and Forests (3 Macq. 419) it was held that salmon fishing in the open sea around the coast belongs to the Crown.

Lord Chief Justice Cockburn, in Queen *v.* Keyn, 230,

makes the following statement as to fisheries: "There has been no express concession of the rights referred to among nations except for violation of neutrality or breach of revenue or *fishery laws*, which, as has been pointed out, stand on a different footing."

Vattel, L. 1, Chap. 23, Sect. 287, says: "The various uses of the sea near the coast render it very susceptible of property. People there fish, and draw from thence shells, pearls, amber, etc. Now in all these respects its use is not *inexhaustible;* so that the nation to whom the coasts belong may appropropiate to itself an advantage which it is considered as having taken possession of, and made a profit of, in the same manner as it may possess the domain of the land it inhabits. Who can doubt that the pearl fishery of Bahrem and Ceylon may not lawfully be enjoyed as property?"

Azuni, 1805 (Droit Maritime de l'Europe, Vol. I., page 252, Sect. 14), assigns dominion and property of the shore sea to the sovereign of the coast, and (page 250, Vol. I. from the translation of 1860) adds, "Great fishing is ranked among the *regalia* of a sovereign, and thus far only abridges the ancient and natural liberty of every maritime people. In consequence of this prerogative, it still belongs to sovereigns to prescribe the manner, kind and seasons of fishing in the seas within their dominions." He adds, "This has been done by the different states of Europe, who forbid the use of nets injurious to the multiplication of fish. Almost all nations have, in this respect, special laws to regulate fishing, and particularly to prohibit or allow it to foreigners. Hence public treaties have been made on this subject for the benefit of nations, such as that in 1456, between Henry VII. and Philip, archduke of Austria. The English and Dutch in

like manner are allowed to fish in the seas of Denmark and Norway, and a convention has been entered into between France and England to fix the times and places of fishing."

The right of fishing in waters adjacent to the coast of any nation belongs exclusively to the subjects of the State. (Lawrence's Wheaton, Part II., Chap. 4, page 323.)

Stewart, in his works on Fisheries of Scotland, Chap. 1, says: "These waters, *mare proxumum*, are vested in the sovereign for the good of the liege to the extent of a marine league. As to territorial seas, the right of fishing is limited to the subjects of the country to which they belong. The law of this country recognizes the rule that subjects of one country are not entitled to fish in the territorial seas of another without a license."

Puffendorf (Book 4, Chap. 5, Sect. 7), says "besides these there are other uses, part of which are not altogether inexhaustible and part may prove an occasion of damage in maritime countries whose interest will not permit that the sea should everywhere lie promiscuously free to all. Of the former kind is fishing, as likewise the gathering of anything which grows in the water. As for fish, though it be much more abundant in the sea than in lakes or rivers, yet it is manifest that it may be in part exhausted, and that if all nations should desire such a right and liberty near the coast of any particular country, that country must be very much prejudiced in this respect, especially as to particular kinds of fish, or perhaps some more precious commodity, as pearls, coral, amber or the like, and to be found only in our part of the sea, and that of no considerable extent. In this case there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are situated at a distance from it."

Schultz on Acquatic Rights, page 4, adopts and quotes Puffendorf as above.

'In 1692 the city of Hamburg obtained the right of navigation and fishing in Davis Strait. By royal edicts in 1751, the commerce of unprivileged foreigners with Greenland was strictly forbidden. With reference to this Phillimore (International Law, Chap. CXC.) says: —

"In these prohibitions there was no violation of strict law, however they might offend the strict comity of nations, but the validity of the prohibition to fish within fifteen German miles of the shore of Greenland was strictly denied by England and Holland, who adhered *to the usual limit of cannon shot from* the shore."

The treaties between this country and Great Britain have uniformly recognized the shore right of the respective parties. The United States has never claimed, except by virtue of a treaty, the right to override the three-mile belt, and there engage in fishing. The original treaty of 1783 was predicated on certain ancient rights in the fishing banks, which, it was claimed, were an appurtenance of the colonies, which remained with them when the colonies became sovereign States. In the treaty of 1818 a definition or modification of the treaty was sought, involving the three-mile limit, but there was no act of this Government ignoring the abstract right of a neighboring sovereignty to the shore belt.

It is sufficient to say that there are no subsisting treaties which conflict with the laws of Massachusetts in question. The extent to which the Federal Government may barter away the proprietary rights of the States need not be discussed herein.

Assuming, even, that the General Government, under the

stress of unfortunate events, might have the power to yield a part of our domain, does it follow that, until then, we may not exercise control over it?

Mr. Justice Davis, in U. S. *v.* 43 Gall. Whiskey, 93 U. S. 188–198, intimates that the United States may have power to make a treaty by which subjects of other nationalities would have the right to acquire, by descent or demise, real property in this country in contravention of the statutes of a State. Does it follow from this that before such treaty is made the States may not legislate upon the subject?

The treaty between France and Great Britain, of 1843, recites: "The limits, in which the general right of fishing is exclusively reserved to the subjects of the two kingdoms respectively, are fixed at three miles from low-water mark."

There were then sundry special provisions respecting bays and headlands. Manifestly, from the whole text of the treaty, the three-mile limit was recognized as an existing right and not in the nature of a concession.

Great Britain has from the earliest period, by appropriate legislation, protected her shore fisheries. The Act of George I., St. 2, Chap. 18, premises as follows: "Whereas in late years the breed of sea fish have been greatly prejudiced and destroyed by the use of nets of too small size and mesh, etc., Be it enacted that after the twenty-fifth day of September, 1716, if any person shall use at sea, upon the coast of that part of Great Britain called England, any trawl net, drag net, or set net whatever, shall forfeit all and singular such net," and the further sum of twenty pounds. This statute is still incorporated among the fishery laws of Great Britain.

Other European nations have similar statutes.

The Right of Navigation not Inconsistent with the Proprietary Interest.

The quality of proprietorship in the three-mile belt, or the waters within the defensive reach of the shore sovereign, is not impaired by the fact that there is a claim of transit-right in other nations. The leading proposition is this: Does the sovereign occupy and control the waters by physical power or means of constant protection? If so, he holds it as he holds land for his own people, and for the transit of the world's people. In this respect we are relegated to the universal rule of harmless use. *Quando sine detrimento suo potest, alteri communicet in iis quæ sunt accipienti utilia, danti non molesta?* De Offie, i. 16. Cicero is in accord herein with *Seneca and Plutarch.* He in fact states an ancient rule of comity, which, among enlightened nations to-day, has the force of law. The concession does not operate to impair the just claim of the sovereign to his territory or the people to their property. Grotius (Lib. 2, Cap. 2, Sect. 13) says: "And so land and rivers, and any part of the sea which is become the *property* of any people, ought not to be shut up against those who have need of transit for a just cause. The reason is, that ownership might be introduced, with reservation of such a use, which is of great advantage to the one party, and of no disadvantage to the other, and the authors of ownership are to be supposed to have intended this." He further observes, "that Moses applied to the Edomites, and then to the Amorites, for leave to pass through the land, on condition of going by the king's highway, and paying for what they took. And when these conditions were

rejected, he, on that account, made war on the Amorites, justly, as Augustine says."

The Greeks of the ten thousand under Clearchus claimed the same right. The King of Macedon applied to Agesilaus for leave to pass. The latter asked time to consult. The king replied: "*Consultet nos interea transibinus.*"

Azumi, Part I., Chap. 3, Sect. 3, thus defines the law: "It follows from this fundamental principle that the empire of the sea, according to the system established in the preceding chapter, is not to be regarded as a vain jurisdictional right, or as a mere honorary title, according to the exaggerated expression of Grotius, but has the real effects of every other kind of property. It differs in nothing from that of the land, and, consequently, gives us the entire disposal of the thing possessed, and the right of selling, exchanging, granting and alienating it at pleasure; provided that the possessor transfers no greater right than belongs to him; that is to say, that those who derive title from him shall preserve their property no longer than while they continue in possession."

The right of navigation through the adjacent waters no more impairs the *jus imperium* therein than the right of commerce through a state impairs the sovereignty thereof.

The right of navigation no more includes, as an incident, the right to take fish, than does the right of free transit across a territory involve the right to take game, *ferœ naturœ*, in violation of local laws in that behalf made. Under the Constitution, a citizen of Massachusetts has the right, without molestation, to pass over the territory of every other State, but he is subject therein to local laws in respect to what he may capture on the way.

The proprietary rights of a government may extend beyond

the three-mile belt, as in the Behring Sea, by virtue of ancient and continued recognition, and by force of the extended necessities for the protection of the share interests. This broad question is not involved herein.

II.

Let us now consider whether the dominion or proprietorship referred to, exists in the States, or in the Federal Government.

JURISDICTION OF THE STATES.

The existence of the State antedates the existence of the Federal Government. The definitive treaty concluded at Paris, Sept. 2, 1783, is in the following terms: —

"His Britannic Majesty acknowledges the United States, namely, New Hampshire, Massachusetts, Rhode Island, etc., to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claim to the government, property and territorial right of the same in every part thereof."

By the Federal Constitution these States became bound together in the more perfect union of the past century.

As is well understood, the powers of the Federal Government are those which are delegated to it by the terms of the Constitution. All else remains with the State. The Federal Government received nothing from Great Britain. Whatever belonged to the sovereignty by the common law was inherited by the States.

Martin *v.* Waddell, 16 Peters, 367.
Wheaton *v.* Peters, 8 Pet. 591.
Kimball *v.* U. S., 12 Pet. 524.

And these powers have been retained by the States, except so far as by express terms they have been conferred upon the General Government.

The questions are: *first*, to what extent do the jurisdiction and property of the sovereignty extend into the sea as a matter of territory and dominion? and, *second*, to what extent have the States parted with this dominion and property in the establishment of the Federal Government?

When the States became sovereign, at the close of the Revolution, they respectively succeeded to the title of the Crown in the tide waters within their territorial limits, and to such rights therein as had previously been granted to local governments established under royal sanction.

Martin *v.* Waddell, 16 Pet. 367.
Pollard *v.* Hagen, 3 How. 212.
Howard *v.* Ingersoll, 13 How. 381.
New Orleans *v.* United States, 10 Pet. 662.
Mumford *v.* Wardwell, 6 Wall. 423–436.
Smith *v.* Maryland, 18 How. 74.
Withers *v.* Buckley, 20 How. 84.
Barney *v.* Keokuk, 94 U. S. 324.
McCready *v.* Va. 94 U. S. 391.
27 Gratt. 985.
Confeld *v.* Coryell, 4 Wash. C. C. 371.
Bennett *v.* Boggs, 1 Bald. C. C. 60.
Gough *v.* Bell, 1 Zeb. 156.
Attorney-General *v.* Stevens, Sax. 369.
Stevens *v.* Paterson R. R. Co., 34 N. J. L. 532.
Paul *v.* Hazleton, 37 N. J. L. 106.
Attorney-General *v.* Hudson Tunnel Co., 27 N. J. Eq. 176.

Storer *v.* Freeman, 6 Mass. 435.
Commonwealth *v.* Alger, 7 Cush. 53–78.
Weston *v.* Sampson, 8 Cush. 347.
Lakeman *v.* Bungham, 7 Gray, 437–440.
Commonwealth *v.* Roxbury, 9 Gray, 451.
Nichols *v.* Boston, 98 Mass. 39–42.
Boston *v.* Richardson, 105 Mass. 351.
Chapman *v.* Kimball, 9 Conn. 40.
Simons *v.* French, 25 Conn. 346.
Church *v.* Meeker, 34 Conn. 421.
U. S. *v.* Smiley, 6 Sawyer, 640.
State *v.* Sargent, 45 Conn. 358–372.
Hollister *v.* Union Co., 9 Conn. 443.
Pipkin *v.* Olmstead, 1 Root, 219.
Moulton *v.* Libby, 37 Maine, 472.
Dover *v.* Portsmouth Bridge, 17 N. H. 200.
Clement *v.* Burns, 43 N. H. 609.
Brown *v.* Kennedy, 5 H. & J. 195.
Owings *v.* Norwood, 2 H. & J. 96.
Den *v.* N. J. Co., 15 How. 426.
Cunningham *v.* Browning, 1 Bland, 299.
State *v.* Medbury, 3 R. I. 138.
Chase *v.* American Steamboat Co., 9 R. I. 419–27; 16 Wall. 522.
Providence Steam Engine Co. *v.* Prov. Steamship Co., 12 R. I. 248.
Tinicum, Fish & Co. *v.* Carter, 61 Penn. 21.
Lansing *v.* Smith, 8 Cowin, 146.
Rogers *v.* Jones, 1 Wendall, 261.
People *v.* N. Y. Ferry Co., 68 N. Y. 71.
Towle *v.* Remson, 70 N. Y. 303, 8.

Mahler *v.* Norwich Transportation Co., 35 N. Y. 352.
People *v.* Tibbetts, 19 N. Y. 523.
People *v.* Vanderbilt, 26 N. Y. 287.
Hudson River R. R. Co. *v.* Loub, 7 Rob. 418.
Dunlap *v.* Commonwealth, 108 Penn. 607.
Dunham *v.* Lamphere, 3 Gray, 268.

It is held in Commonwealth *v.* Roxbury, 9 Gray, 483, that the Colonial charters conveyed or granted both the *jus privatum*, the title to the land to be held in fee, subject to the rule of the common law as private property, and the *jus publicum*, or all those rights to the crown in the sea and shore, bays and arms of the sea where the tide ebbs and flows, in trust for the public use of all those who shall become inhabitants of said territory and subject to said government.

By the terms of the original charters and grants, and by acquiescence, the Colonies acquired a right of self-government. As said by Chief Justice Shaw, in Commonwealth *v.* Roxbury, 1 Pick. 481, "The effect of the charter was to grant to the Government and company, as a body, the *jura regalia*, or prerogative rights of the Crown, to be held for the Colony as the Crown holds them for the realm of England." This gave to the Colonies the right of dominion as far as it may extend under the law of nations, and it is a matter of colonial history that this power, in respect to fisheries, was, in fact, exercised and enforced through the common-law courts.

It was held in Martin *v.* Waddell, 16 Pet. 367, that the grant from Charles II. to the Duke of York of the territory which now forms the State of New Jersey "passed to the

Duke the soil under the navigable waters as one of the royalties, incident to the powers of government, which were granted to be held by him, in the same manner and for the same purposes as this soil had been previously held by the Crown. When these grantees surrendered to the Crown all the powers of government, the title to this soil passed to the Crown, and, at the Revolution, became vested in the State of New Jersey."

We have included and appended hereto some of the ancient laws of Massachusetts and of the neighboring colonies (see Appendixes B, C, D, E, F, G, H, I, K, L, M). It will appear from these that this right of dominion or proprietorship beyond low-water mark was, from the earliest times, asserted and enforced. Some of these laws were almost identical with that under which these proceedings are had. The fisheries were a source of revenue to the Colony. By the Order of 1670 (Appendix K), this revenue was applied to the education of youth "in literature for the good and benefit of posterity."

Ancient Jurisdiction.

Observe that jurisdiction to enforce these ancient laws was assigned to the common-law courts. Observe specially that the law of respecting oyster beds in Barnstable and other bays (1675, Appendix B) assigned jurisdiction "in any of the Courts of Record or before any justice of the peace." It is common knowledge that Barnstable Bay has no narrow outlet. Observe also the law of 1668 (Appendix G) respecting the killing of codfish, haddock, mackerel, etc., in the spawning season; jurisdiction thereunder was assigned to the county courts. As early as 1673 the Colonies had estab-

lished a court of admiralty. After the Declaration of Independence, and before the adoption of the Constitution, the Colony of Massachusetts had established or re-established its admiralty courts. (Chap. 7, Acts of 1775–76; Chap. 23, Acts of 1777–78).

From the history of legislation thus stated, it will appear that, in the presence of an Admiralty Court, jurisdiction over fishery cases was assigned to the common law tribunals. And all this during a period when, as Chancellor Kent observes, "the vice admiralty courts of the Colony were exercising the most ample jurisdiction."

Act of 1680, Chap. 17, the Province of Virginia (Henn. Statutes at Large, page 437) provides as follows: "No person shall kill or strike any fish whatsoever within the bounds and limits within the shore waters or shores of Gloucester County, Middlesex County or Lancaster County with gigs, harping irons or other such like instruments. The penalty is made recoverable in any of his Majesty's Courts in this Colony of Virginia by action of debt, bill, plaint or information, any law or usage to the contrary notwithstanding.

An Act of the Province of Rhode Island, 1734, provides as follows: " Any person who shall take oysters by other methods more destructive than oyster tongs in any of the bays, coves, rivers or harbors shall forfeit his vessel, etc., to be recovered by action, bill, complaint or information before any of the courts of common pleas or general sessions of the peace."

By Act of the Province of Connecticut, 1769, it was provided that the towns of New Haven, Fairfield, and all other and every town in this colony bordering on the sound, sea or rivers having oysters or clams growing or lying in any river, harbor, cove, creek or flats within the limits of such towns respectively, or adjoining or appertaining thereto, shall have power to make rules and ordinances respecting the taking of such oysters and clams.

Coming down now to the period subsequent to the establishment of the Federal Government, we have an uninterrupted line of adjudications in the common-law courts. It is not necessary to group the cases under this head, for it will be observed throughout that the cases were uniformly determined in the courts of common law.

The course of early legislation is consistent with the judicial determination and exposition of text writers.

Wheaton states (page 258) the law as follows: —

"The right of fishing in the waters adjacent to the coast of any nation within its territorial limit belongs exclusively to the sovereigns of the State."

It has been repeatedly held that it is not repugnant to the Constitution for a State to prohibit the taking of shellfish in the navigable waters of any State.

Corfield *v.* Coryell, 4 Wash. C. C. 371.
Bennett *v.* Boggs, 1 Bald. C. C. 60.
Thompson *v.* Whitman, 18 Wall. 457.

In Corfield *v.* Coryell, *ubi supra*, it is held that the control of fisheries was not ceded to the United States by the commerce clause of the Constitution, — that this is a right of property vested in certain individuals or in the State for the use of its citizens.

In McCready *v.* Virginia, 94 U. S. 391, Chief Justice Waite says, "The principle has long been settled in this court that each State owns the bed of all tide waters within its jurisdiction unless they have been granted away; in like manner, the State owns the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. The title thus held is subject to the para-

mount right of navigation, the regulation of which in respect to foreign and interstate commerce has been granted to the United States. There has been, however, no such grant of power over fisheries. These remain under the exclusive control of the State."

Another case came up from the same locality, Smith *v.* State of Maryland, 18 Howard, 74, wherein the Court say, referring to the soil below low-water mark: "The State holds the property of this soil for the consummation of the public right of fishery therein, and may regulate the mode of that enjoyment so as to prevent the destruction of the fisheries. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpared those public uses for which the soil is held. It is within the legislative powers of the State to interrupt the voyage and inflict the forfeiture of the vessel enrolled and licensed under the laws of the United States for a disobedience of those of Board of the commands of such laws."

In Dunham *v.* Lamphere, *ubi supra*, Chief Justice Shaw says, "The privilege and benefit of fisheries on the shore and coast of the sea has at all times been regarded as a valuable advantage, both as a means of subsistence and a source of commerce, in all civilized communities. Like other valuable commodities, as well swimming as shell fish are susceptible of being property; 'and every such thing,' says Vattel, 'is conceded as belonging to the nation that possesses the country, as forming part of the aggregate mass of its wealth.' Those not divided are called public property."

See also,

Commonwealth *v.* Algers, 7 Cush. 53.
New Orleans *v.* U. S., 10 Pet. 662.
Pollard *v.* Hagan, 3 Howard, 212.
Hess *v.* Muir, 5 Cent. 583.
Brown *v.* Degoff, 12 Cent. 818.

The case of Dunham *v.* Lamphere was very similar to the one at bar. The defendants were charged with violating a statute which prohibited seining within a mile of the shore of Nantucket. The case is cited with approval in the recent case of Dunlap *v.* Commonwealth, 108 Pa. 607, wherein the Supreme Court held that State of Pennsylvania has jurisdiction over the waters of Lake Erie adjacent to the territory of the State. See also Willson *v.* Marsh Co., 2 Pet. 245.

The same rule as to the extent of jurisdiction applies in cases of municipal seizures on the tide waters.

"The jurisdiction of a State is coextensive with its territory."

U. S. *v.* Devans, 3 Wheat. 336.

And this brings us to the defendants' contention as to county lines or the extent of the body of a county.

III.

Limit of the Body of a County.

Originally, and until 1685, the whole of Plymouth Colony was one country. The Act of 1668 (see Appendix G) refers to the magistrates of the county courts. The towns of the colony in 1685 were grouped into counties, but

the separate county limits seaward were not by expressed terms distinctly fixed. The implication, however, from the course of legislation, is that county jurisdiction was considered as extending to the limites of the colony. The Colonies at that time had ample power to define and establish their own limitation in this respect. The inference to the above conclusion is confirmed in some instances by more definite acts creating counties in the neighboring colonies; for instance, the county of Worcester, Md., which borders on the ocean, and was set off from Somerset County in 1742, is described as embracing "all the remaining part of Somerset County to the extent of this province."

We have cited several acts in the appendix, page , where, by early orders, jurisdiction in fishery cases was assigned to common-law courts, and the law further specifically names courts of the county, and that too, after the establishment of the counties of Barnstable, Plymouth and Bristol. Observe particularly the Act of 1765 (Appendix B). This was an act for the protection of fisheries, and the penalty was made recoverable "by action, information or presentment of a grand jury in any of his Majesty's Courts of Record proper to try the same." Beyond this it was provided that the prosecutor might proceed before a *justice of the peace*.

The extent of county lines is immaterial, in view of the Act of 1887, under which this proceeding was brought. Assuming that the waters of Buzzard's Bay are within the jurisdiction of the State of Massachusetts, it was entirely competent for the Legislature to make the taking of fish by means of purse seines punishable in any of our courts. Jurisdiction was, by the terms of the act, assigned to the county courts, and this was within the appropriate range of

legislation, irrespective of the limit of the county; for the three-mile belt is no more or less within the dominion of the State because it is within the body of a county.

In this country, counties are dependent for their existence on the consent of the Legislature, which may change their boundaries at pleasure if not restricted by express constitutional provision.

Gould on Waters, §§ 13, 14.
Laramie Co. *v.* Albany Co., 92 U. S. 307.
Opinion of Justices, 6 Cushing, 578.
Stone *v.* Charlestown, 114 Mass. 214.
Burns *v.* Clarion County, 62 Penn. 425.
Eagle *v.* Beard, 33 Ark. 497.
Dodson *v.* Fort Smith, 33 Ark. 508.
Albernathy *v.* Dennis, 49 Mo. 468.
State *v.* Shortridge, 56 Mo. 126.
Opinion of Supreme Court, 55 Mo. 295.
Baltimore *v.* State, 15 Md. 376.
Goff *v.* Frederick City, 44 Md. 67.
Frederick *v.* Goshon, 30 Md. 436.
Wade *v.* Richmond, 18 Gratt. 583.
Wallace *v.* Trustees, 84 N. C. 164.
Pell *v.* Newark, 40 N. J. L. 71.
Detroit *v.* Blackeby, 21 Mich. 84.
Beckwith *v.* Racine, 7 Biss. 142.

Chap. 22, Sect. 21, of Pub. Stats. provides that "the boundary of counties bordering on the sea shall extend to the line of the Commonwealth," and that "jurisdiction of counties separated by water shall be concurrent upon and over such waters."

This law was originally enacted in 1859, Chap. 289, and soon after the decision in the case of Commonwealth *v.* Peters, 12 Met. 387 (1849), wherein the Court was embarrassed with the question of whether or not the offence, which was committed in Boston Harbor, was within the jurisdiction of the court, under the old rule "that a place being within the *fauces terræ*, where a man may reasonably discern between shore and shore, is within the body of the county." It is said in an article in 11 American Law Review, 625, that a *nisi-prius* ruling in a Barnstable case by Judge Allen, wherein he queries as to the territorial jurisdiction of the county, led to the legislation referred to. But whatever doubt formerly existed, the matter is now settled by statute; and the limit of the county and jurisdiction of the county are coextensive with the jurisdiction of the State seaward, and concurrent with other counties over waters which separate them.

The Rule as to Bays and Arms of the Sea.

The rule respecting vision from *fauces* to *fauces* seems to have been recognized in a few American cases. The origin of the rule is somewhat obscure and its actual application uncertain. Gould on Waters, Chap. 5, says: "The question is distinct from that of the territorial jurisdiction of the nation, which is determined by the presumed range of cannon shot." He adds: —

"Certain bays and estuaries of the sea which are greater in width than six miles, or the double range of cannon, may be within the limits of counties and of the nation. Islands which lie within arms of the sea, and also within the county,

have been regarded as opposite shores, within the foregoing rule, and in treaties between nations and in the works of writers upon international law, bays having a width of ten miles have been conceded a part of the territory of the nation by which they are enclosed."

We again recur to the fact that Buzzard's Bay is an arm of the sea, where the headlands are less than two marine leagues apart. Whatever doubts have existed as to the limit of control beyond an open shore, there has been practically no dispute in respect to the proposition that bays, with narrow outlets, are a part of the domain of the surrounding sovereignty. In the case of the Direct United States Cable Company *v.* the Anglo-American Telegraph Company, *ubi supra*, it was held that Conception Bay, whose average width is fifteen miles, with a greater distance between its headlands, was within the jurisdiction of Newfoundland. Lord Blackburn, who delivered the opinion of the Court, page 417, refers to the old rule recognized by Hale (De Jure Maris, page 1, Chap. 4): "That an arm of the sea, which lies between *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner." And observes thereon: "Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning. If it means to see what men are doing, so, for instance, that an eye-witness on shore could say who was to blame for the fray on the waters resulting in death, the distance would be very limited; to discern what great ships were about, so as to be able to see their manœuvres, it would be much more extensive. In either case it is indefinite."

He then refers to Reg. *v.* Cunningham, 1 Bells. Crim. Chap. 86, a case which arose in Bristol Channel. The geography of the body of water in question is not very clearly set forth in the report, but the Court say, page 419: "This much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glomorgan, and, consequently, in every sense of the word, within the territory of Great Britain." It is further said: "Passing from the common law of England to the general law of nations, as indicated by the text-writers on international jurisprudence, we find an universal agreement that harbors, estuaries and bays land locked belong to the territory of the nation which possesses the shores around them, but no agreement as to what is the rule to determine what is 'bay' for this purpose." The Court further say that most of the writers of the subject adopt the three-mile rule. But the conclusion in that particular case was to the effect that a land-locked bay with a much wider opening than exists at the outlet of Buzzard's Bay may belong to the sovereignty of the surrounding shore.

See also,

Manning's Law of Nations, 120.
Wheaton's Int. Law, 255.
Grotius, De Jure Belli, Book 2, Chap. 3, §§ 7, 8.
Vattel, Book 1, Chap. 3, § 290.
Ortolan Diplom de la Mer, Book 2, Chap. 8.
Phillimore's Int. Law, § 200.
1 Kent's Com. 28, 29.
Gould on Waters, Chap. 1, § 5.

IV.

Federal and State Jurisdiction.

It is to be observed that the English admiralty courts had jurisdiction of causes out of the body or extent of any English county. (4 Blackstone, 268.) But the common-law limit of jurisdiction as to place was not contemplated in the Constitution or the judiciary act of 1789, for, under the decision in the Genesee Chief, 12 Howard, 487, which is the settled law of to-day, admiralty jurisdiction in this country extends wherever "ships float and navigation aids commerce."

These latter decisions force the defendant from his position in respect to county lines, for now, as to strictly admiralty cases, jurisdiction in United States Court extends to navigable steams far above tide water. Does it follow therefore that these States have no jurisdiction in their courts over statutory crimes committed on these waters? and cannot these States regulate the fisheries in the waters where the admiralty courts have jurisdiction in strictly admiralty causes? Such a proposition would, at least, lead to an alarming conclusion on the question of good order.

The development of the present established rule, giving jurisdiction in admiralty courts over the inland streams, from the rule asserted in the old case of *Thomas Jefferson*, 10 Wheaton, 426, and "The Desoto," 5 Howard, 485, wherein the tide-water limit was recognized, is sanctioned by the proposition stated by Mr. Justice Wayne in the *Desoto* case, "The grant of admiralty power to the courts of the United States was not intended to be limited, or to be interpreted by

what were cases of admiralty jurisdiction in Europe when the Constitution was adopted."

Again the Court say, in the case of "The Belfast," 7 Wallace, at 636, "The admiralty jurisdiction as exercised in the Federal courts is not restricted to the subjects cognizable in the English courts of admiralty at the time of the Revolution, nor is it as extensive as that exercised by the Continental courts organized under or governed by the principles of the civil law." See also Chief Justice Torney, in the case of *Bags of Linseed Oil*, 1 Black, 113.

It seems now to be settled, says that author, "that Federal courts as courts of admiralty are to exercise such criminal jurisdiction as is conferred upon them expressly by Acts of Congress, and that they are to exercise none other. The United States courts have no unwritten code to which resort can be had as a source of jurisdiction."

See

United States *v.* Hudson & Goodwin, 7 Cranch, 32.
United States *v.* Coolidge, 1 Wheaton, 415.
United States *v.* Bevens, 3 Wheaton, 336.
United States *v.* Wiltberger, 5 Wheaton, 76.
Smith *v.* Jackson, 1 Paine, 463.

Disregarding recent amendments, under the English law cases of marine felonies are tried before a court differently constituted from that which tries civil causes in admiralty. Under the former English law there was a specific assignment of jurisdiction with reference to the body of a *county*, but, as above observed, there is in this country no general assignment of criminal jurisdiction in admiralty, except in

specified cases, where it is generally limited to waters "*out of the jurisdiction of any particular State.*"

The rule laid down by Hamilton, 82 Federalist, and adopted by Kent, Vol. 1, page 396, is "that a concurrent jurisdiction exists in the State, except in cases where the power has been taken away by an exclusive authority granted in express terms to the Union and the exercise of a like power prohibited to the States, as in cases where the authority was granted to the Union when a similar authority in the States would be utterly incompatible."

Mr. Kent further says, "Congress in the course of legislation might commit the decision of cases arising upon its laws to the Federal court explicitly, but unless the State courts were expressly excluded by the Act of Congress they would, of course, take concurrent cognizance of the causes to which those acts might give rise, subject to the exception which has been stated."

To reason that because the Constitution provides that judicial power "shall extend to all cases of admiralty and marine jurisdiction," the jurisdiction thus assigned, without Congressional action, became exclusive in all cases arising upon waters, when pressed to its legitimate conclusion, would hazard our entire judicial system, for, in the same article of the Constitution, it is further provided that the judicial power of the United States courts shall extend to "controversies between citizens of different States." And yet for a hundred years courts of State have assumed jurisdiction, or rather continued to exercise jurisdiction, in causes between citizens of different States, saving to the parties a right of removal into a United States court on proper motion.

V.

From the nature of the case, the fisheries in question are subject to the control of the State. Adopting, as a postulate, the language of the Court in Corfield *v.* Coryell, 4 Washington, 378, that the grant to regulate commerce on the navigable waters belonging to the several States is not a session, expressed or implied, of territory, or of public or private property; that the *jus privatum* which a State has in the soil covered by its waters is totally distinct from the *jus publicum* with which it is clothed; that the former, such as fisheries of all description, remain common to all the citizens of a State to which it belongs, to be used by them according to the laws which regulate their use. And the language of the Court to the same effect, respecting admiralty jurisdiction: let us consider to what extent the provisions of the Constitution and the acts of Congress thereunder, applicable to fisheries, modify or limit the right of States to measurably exercise concurrent authority. It must be recognized that there are certain necessities of Government which were contemplated by the framers of the Constitution, and those who gave to it its first interpretations. It must also be recognized that the system of government is designedly complex, but presumably complete, supplying to the people ample and complete protection for life and property. The system primarily contemplates local government, and the departure is from that basis towards centralization only as the exigencies of the subject require. Certain measures, like rules for naturalization, need to be general and uniform. Other measures cannot be uniform, because the facts and

conditions vary widely with the locality. Where the subject was originally a matter of local government, and where it is to be dealt with according to the circumstances of the locality, a mere affirmative power in the Federal Government is never held to be exclusive of a like power in the State.

Of the several powers delegated to Congress in the eighth section of Article 1 of the Constitution, aside from those where the States are expressly excluded, only a few are held to be exclusively in the General Government. Referring to the provision that Congress shall have "power to collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general warfare," Judge Story says the existence of concurrent power is not incompatible with the exercise of it by Congress. The power to regulate commerce is not entirely exclusive in Congress, except in respect to subjects of general concern under the conditions and limitations set forth in the recent case of Leisy *v.* Harden, 135 U. S. 100. The power to establish uniform laws on the subject of bankruptcy is not exclusive except so far as it is exercised by Congress. As to the power in Congress to fix the standard of weights and measures, Judge Story says: "Until Congress shall fix the standard the understanding is that the States possess the power." The power to punish counterfeiting coin and currency of the United States does not preclude the State from providing punishment for passing counterfeit United States money.

Fox *v.* Ohio, 5 Howard, 510.

That the power to establish post roads and the power to promote the progress of useful sciences are absolutely exclusive in Congress is questioned by Judge Story, and therein

he is supported by some adjudications. The power to punish felony in the high seas is not exclusive except as made so by Congress, as held in the case of Commonwealth *v.* Devens. It is also said by Judge Story, "If Congress did not choose to arm, organize and discipline the militia there would be an inherent right in Congress to do it.

Nothing could have been further from the intention of the framers of the Constitution than the proposition that, because in certain matters of common universal concern, Congress may intervene, States cannot exercise their old inherent powers, where the concern is local. Such a construction would operate, in the case at bar, under the rule proposed by the defence, to impose upon Congress the police protection of every bathing place upon the shores of the United States. More serious than this even, it would impose upon Congress the invention of measures adaptable to localities in various climates and under widely different conditions. Assuming that the laws for the protection of fisheries, which for four hundred years have been upon the books of this and the mother country, are not unnecessary, Congress must devise a code of laws for the preservation of lobsters on the shores of New England, oysters in the waters of Virginia, and the fish that swim in the tide waters of the Gulf and by the Pacific coast.

A decision against the Commonwealth herein would practically nullify the various State statutes respecting shore fisheries, which have been enacted in the light of the needs and experience of particular localities; it would oust the States from a supposed jurisdiction which, for one hundred years, they have been exercising for the promotion of good order and the security of their property.

To hold that the power of Congress to exercise jurisdiction in these waters excludes a concurrent power in the State respecting matters requiring local control would do violence to the rule fully affirmed in Leisy *v.* Harden (*original package case*). In that case the Chief Justice thus clearly defines the law: "The power to regulate commerce among the States is a unit: but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them, with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries and highways, belong to the class of powers pretaining to locality, essential to inter-communication, to the progress and development of local prosperity, and to the protection, the safety and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by the States, except so far as falling within the scope of a power confided to the General Government. Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the powers granted to the General Government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by action of Congress in the effectuation of the general power."

On the broad proposition, applicable to the case at bar, there was a concurrence of opinion on the part of the entire Court, in respect to a rule that would include fisheries. Mr. Justice Gray, in the dissenting opinion, says: "The police power includes all measures for the protection of life, health, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals," and extended the rule for the benefit of the States further than was conceded by the majority of the court. We have quoted herein, somewhat at length, the authorities cited in the entire case.

Our contention is, that, on the subject of fisheries, and to the extent of their protection in local waters, there is still, with the States, at least a concurrent power; because, even admitting that Congress may legislate thereon, it does not appear that Congress has exercised the power to the extent of divesting the States of their ancient rights.

The fact that Congress has to some extent legislated upon the subject does not necessarily amount to a prohibition to the States. Notwithstanding Congress had legislated upon the subject of commerce and navigation, the decision in the Blackbird Creek Marsh County case is still good law; and, notwithstanding Congress annually provides for the improvement of harbors and navigable streams, the authority of the State was sustained in Kimball *v.* Mobile and Escanabaco County *v.* Chicago, *ubi supra.*

In Gibbon *v.* Ogden, 9 W. 1–12, the Court say, referring to inspection and kindred laws: "They form a part of that immense mass of legislation which embraces everything within the territory of the State not surrendered to the General Government; all of which can be most advantageously exercised by the States themselves. Inspection laws,

quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of the mass. If the Legislature of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose or is clearly incidental to some power which is expressly given. It is obvious that the Government of the Union, in the exercise of its expressed powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by the State. . . . So if a State in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be exercised by the same means."

In Wilson *v.* The Blackbird Creek Marsh Co., 2 Pet. 245–251, the Court say: "The act of the Assembly by which the plaintiffs were authorized to construct their dams shows plainly that it is one of those many creeks passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States." It was held, under all the circumstances of the case, the act complained of was

not repugnant to the power in Congress to regulate commerce. This, of course, does not imply that States broadly can obstruct completely the navigation of all and every river in the State. The case went off on the facts as they appeared therein.

In Beer Company *v.* Massachusetts, 97 U. S. 25–33, the Court say: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and public morals."

In Barbier *v.* Connolly, 113 U. S. 27–31, the Court say: "The amendment was not designed to interfere with the broad power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In Cooley *v.* Board of Wardens of the Port of Philadelphia, 12 Howard, 299–320, the Court say: "It manifests the understanding of Congress at the outset of the Government that the nature of this subject is not such as to require exclusive legislation. The practice of the States and of the National Government has been in conformity with this declaration, from the origin of the Government to this time; and the nature of the subject when examined is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulations, drawn from local knowledge and experience, and conform to local law. How, then, can we say that by the mere grant

of power to regulate commerce the States are deprived of all the power to legislate on this subject, because, from the nature of the power the legislation of Congress must be exclusive? This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands in all cases exclusive legislation by Congress, while the nature of one of the subjects of that power not only does not require such exclusive legislation but may be best provided for by many different systems enacted by the State in conformity with the circumstances of the ports within their limits. It is the opinion of the majority of the Court that the mere grant to Congress of the power to regulate commerce did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject its legislation manifests an intention, with the single exception, not to regulate this subject, but to leave its regulation to the several States."

In Morgan *v.* Louisiana, 118 U. S. 455–465, the Court say, respecting quarantine laws: "It belongs also, and manifestly, to that class of rules which, like pilotage, and some others, can be most wisely exercised by local authorities, and in regard to which no general rules applicable alike to all ports and landing places, can properly be made."

See also,

County of Mobile *v.* Kimbal, 102 U. S. 676, as to improvement of harbor.

Escanaba County *v.* Chicago, 107 U. S. 678, as to deepening channel in a navigable stream.

Transportation Company *v.* Parkersburg, 107 U. S. 691, as to wharves.

Brown *v.* Houston, 114 U. S. 622, as to tax on goods subsequently exported.

Smith *v.* Alabama, 124 U. S. 465.

Nashville & C. R'y Co. *v.* Alabama, 128 U. S. 96, as to examination of railway engineers.

Patterson *v.* Kentucky, 97 U. S. 501.

Webber *v.* Virginia, 103 U. S. 344, as to control of property covered by patent.

Mugler *v.* Kansas, 123 U. S. 623.

Barleneyer *v.* Iowa, 18 Wall. 129.

Foster *v.* Kansas, 112 U. S. 201, as to liquors.

Prigg *v.* Penn., 16 Pet. 539, extradition of fugitive slaves.

U. S. *v.* DeWitt, 9 Wall. 91.

Phalan *v.* Virginia, 8 Howard, 163, turnpike, lottery.

Stone *v.* Mississippi, 101 U. S. 814, lottery.

Butcher's Union Co. *v.* Crescent City Co., 111 U. S. 746.

New Orleans Gas Co., *v.* Louisiana Light Co., 115 U. S., 650–726.

New Orleans *v.* Houston, 119 U. S. 267–275, lottery.

Patterson *v.* Kentucky, 97 U. S. 501.

Slaughter House cases, 16 Wall. 36, 62, 87.

Fertilizing Co. *v.* Hyde Park, 97 U. S. 659.

U. S. *v.* DeWitt, 9 Wall. 41, naphtha oil.

Veasie *v.* Moore, 14 Howard, 568–575, navigation in Upper Penobscot.

Referring to the case of U. S. *v.* Bevans, 3 Wheaton, 336, the Court say, in Smith *v.* Maryland, 18 Howard, at 76, on the Admiralty question: —

"But we considered it to have been settled by this Court in U. S. *v.* Bevans, 3 Wheat. 336, that this clause in the Constitution did not affect the jurisdiction nor the legislative power of the States over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution."

It was also held that the act referred to was not repugnant to the clause of the Constitution which conferred upon Congress the power to regulate commerce, "and that the enrollment and license of the vessel conferred upon the plaintiff in error no right to violate the statute of Maryland."

VI.

Criminal Jurisdiction.

In the discussion of this branch of the case we will again start with the postulates that limitations as to jurisdiction of admiralty courts in England do not define jurisdiction in this country, that the rule of limitation as to the extent of English counties did not apply to the ancient counties under the Colonial laws, and do not apply to counties as they exist under our statutes at the present time.

Art. 3, Sect. 2, of the Constitution provides that "the judicial power of United States courts shall extend to all . . . cases of admiralty."

The Judiciary Act of 1789 erected District Courts and

assigned to them "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." The entire constitutional power of the Federal Government, in respect to civil causes in admiralty has been, by appropriate legislation, assigned to District Courts, but in respect to criminal jurisdiction there was no such general assignment, and, in the language of Mr. Kent, Vol. 1, page 363, "without a particular legislative provision, the Federal courts do not exercise jurisdiction as courts of admiralty over maritime offences."

The place within which various crimes can be committed within the jurisdiction of the admiralty court is variously stated in the United States statutes, according to the character of the offence. For instance, in respect to murders, Sect. 5339, Rev. Statutes, the description of place is "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State." Revolt and mutiny, Sect. 5360, are punishable when committed "on the high seas or any other waters within the admiralty and maritime jurisdiction of the United States." Conspiracy to cast away a vessel, Sect. 5364, is punishable if the offence is committed upon "the high seas or within the United States." The destroying of a vessel by the owner, Sect. 5365, is punishable if committed on the "high seas." Robbery, Sect. 5370, is punishable if committed "upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows." Hovering on coast of the United States with slaves on board, Sec. 5380, is punishable if the vessel be found in "any river, port, bay, harbor, or on the high

seas within the jurisdictional limits of the United States, or hovering on the coast thereof." Sect. 5391 applied particularly to offences committed in any place which has been, or may hereafter be ceded to, and under the jurisdiction of the United States. If the offence be not prohibited, or the punishment thereof is not specially provided for by any law of the United States, "the offence shall be liable to, and receive, the same punishment as the laws of the States in which such place is situated now enforce." These variations in defining the limits of place where the different offences may be committed clearly indicate that it was assumed by Congress that a further power existed in the States which could be invoked wherever within their limits the acts of Congress did not apply.

An early case in which this question was raised is reported in 4 Dallas, 426, United States *v.* McGill, wherein a person was tried for murder committed on the high seas. One of the judges observed that he had often decided that the federal courts had no common-law jurisdiction in criminal cases. Afterwards in United States *v.* Bevens, 3 Wheat. 336, the Court held "that, even if the United States had exclusive admiralty and maritime jurisdiction, and admitting that a murder committed in the waters where the tide ebbed and flowed was a case of marine jurisdiction, yet that Congress had not, by the eighth section of the Act of 1790, providing for the punishment of certain crimes against the United States, conferred on the courts of the United States jurisdiction over such murders. The act confined the Federal jurisdiction to murder and other crimes and offences committed on the high seas, or in any river, harbor, basin or bay out of the jurisdiction of any particular State."

(See Rev. Stats. 5339.) The Court further say: "If, then, it should be true that Massachusetts can take no cognizance of the offence, yet, unless the place itself be out of her jurisdiction, Congress has not given cognizance of that offence in its courts. If there be a common jurisdiction, the crime cannot be punished in the courts of the Union." Again the Court say: "The general jurisdiction over the place, subject to this grant of power, adheres to the territory as a portion of sovereignty not yet given away. The residuary power of legislation is still in Massachusetts." (See also United States *v.* Wiltberger, 5 Wheat. 76.)

U. S. *v.* Davis, 2 Sumner, 482.
U. S. *v.* Grush, 5 Mason, 290–300.

In 1 Kent, 364, it is stated "that it is now settled that the Federal courts of admiralty are to exercise such criminal jurisdiction as is conferred upon them expressly by acts of Congress, and that they are not to exercise any other. The United States courts have no written criminal code to which resort can be had as a source of jurisdiction."

The question of what was the boundary line of the body of a county at common law is not now pertinent, or the long controversy between the common law and admiralty courts of Great Britain; for, according to the authorities above cited, the admiralty courts of this country, in respect to crimes, derive their powers solely from statutes.

See also,

Butler *v.* Steamship Company, 130 U. S. 527.
The Belfast, 7 Wall. 624.
The Eagle, 8 Wall. 15.
Leon *v.* Galceran, 11 Wall. 185.

Steamboat Co. *v.* Chase, 16 Wall. 522; 9 R. I. 419.
Shoemaker *v.* Gilmore, 102 U. S. 118.
Ins. Co. *v.* Dunham, 11 Wall. 1.
Ex parte Byers, 32 Fed. Rep. 404.

In the case of Smith *v.* Maryland, 18 Wall. 71, the jurisdiction of the State court was sustained in a proceeding for the forfeiture on a seizure in navigable waters under a State law as to the taking of oysters.

By the decision of the Supreme Court, Genesee Chief, 12 Howard, 457, overruling previous decisions, it was held that the jurisdiction of Federal courts extended "wherever ships float and navigation successfully aids commerce. (See the Eagle, 8 Wall. 15.) The Court says, in the latter case, this "removed the imaginary line of tide water which had been supposed to circumscribe the jurisdiction of the admiralty court." The decision, however, did not practically enlarge the jurisdiction in criminal matters. It simply extended the jurisdiction in strictly admiralty cases over more water. It did not affect the provision that in criminal proceedings the offence to be cognizable in the United States court must have been committed without the jurisdiction of a State. The manifest intent of Congress, in defining the criminal jurisdiction of courts of its creation, was to provide for personal security in those places where the protective jurisdiction of State did not extend, and it was not the intention of Congress to encroach upon the police powers of a State or to unnecessarily multiply criminal proceedings.

The dominion of the State is not limited by the extent of its counties. The constitution did not contemplate an eternal fixedness of county lines. It, in fact, is not necessary

that such subdivisions of territory exist at all. That the people of a State must helplessly witness their laws defied by any person who may choose to step into the water at low tide to do the act, because at that point he is without the body of a county, is a presumption at least dangerous to the security of society.

As the Federal Government has no complete criminal code and no common law as to crimes, and, moreover, as the criminal statutes which the Federal government have adopted can be enforced in many instances only without the jurisdiction of a State, the term *fauces terræ (terroris)* under defendant's construction acquires a new significance, for the *fauces* lead to a place over which the State, which has laws, has no power, and over which the Federal government, which has power, has no laws.

VII.

Fishing License.

The question raised by the defendant, to the effect that he is protected by his Federal license or enrolment to engage in fishing, has been passed upon by the Supreme Court of this State and of the United States. It was held in Dunham *v.* Lamphere, 3 Gray, that the effect of this enrolment and license was "to give the vessel all the benefits and privileges of navigating the tide waters of the State and such rights to bounty and other privileges as are given to fishing vessels by the laws of the United States, but it does not affect the present question." Referring to the defence therein set up, that the defendant was a citizen of another State, the Court say: "We may fairly say that these enactments were

designed to preserve and improve the fishery for the benefit of any and all persons entitled to enjoy the advantage of it; and surely those inhabitants of other States who come within the territorial limits of this State, and thereby owe a temporary allegiance and become amenable to its laws, have no just reason to complain when within those limits, and enjoying the benefits in common with our citizens, they are bound to conform to a salutary law necessary for the common good. It deprives them of no benefit or privilege which the Constitution and laws of the United States could give or do profess to give, that of a free navigation in and over all navigable waters of the State. It was held in Smith *v.* Maryland, *ubi supra*, that a Federal license did not protect the party from seizure."

The Court say, "Such enrolment and license confer no immunity from the operation of valid laws of a State. If a vessel of the United States, engaged in commerce between two States, be interrupted by the laws of a State, the question arises whether the State had power to make the law, by force of which the voyage was interrupted. The question must be decided, in each case, upon its own facts. If it be found, as in Gibbon *v.* Ogden, 9 Wheat. 1, that the State had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful, and the proceedings under the law valid. But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws."

See also,

Haney *v.* Compton, N. J. L. 507.

State *v.* Medbury, 3 R. I. 138.

N. E. Oyster Co. *v.* McGarvey, 12 R. I. 385.
Johnston *v.* Drummond, 20 Gratt. 419.

As this is but a specification of the broad question hereinbefore discussed, a repetition of authorities is not needed. The license is manifestly not intended to be in the nature of a letter of marque authorizing the vessel to operate in violation of existing laws, either of a State or of a nation. If the act of the Legislature of the State of Massachusetts be a valid law, under the Constitution of the United States, the licensee is, of course, amenable to it, as he is to the ordinary health and police laws of the localities into which he may sail.

VIII.

The Act of 1886.

Observe that the Act of 1886 does not discriminate against the citizens of any sister State or foreign nation. It was enacted to preserve, for the benefit of all people who might come, fisheries, which, except for reasonable protection, might become absolutely destroyed.

Prof. Baird in U. S. Fish Commission Report, 1866–67, Part V., page 109, thus speaks of menhaden: "At least one fourth the fish devoured by bluefish on the New England coast are menhaden"; and he estimates the number consumed to be three hundred million of millions. "There are," he says, "countless myriads, helpless as flocks of sheep, swimming in closely packed and unwieldy masses close to the surface, and, at the mercy of any enemy, destitute of any means of defence and offence, their mission is

unmistakably to be eaten. In the economy of nature, certain orders of terrestial animals, feeding entirely upon vegetable substances, seem intended for one purpose, — to elaborate simpler materials into nitrogenous substances necessary for the feed of other animals which are wholly or in part carnivorous in their diet; so the menhaden, deriving its subsistence from otherwise unutilized organic matter, is preeminently a meat-producing machine. Man takes from the water annually six or seven hundred million of these fish weighing from two hundred and fifty to three hundred thousand tons, but his indebtedness to the menhaden does not end here. When he brings upon his table bluefish, bonitos, weakfish, swordfish, bass, codfish, what is he eating? Usually nothing but menhaden."

It is notorious, and a matter which is discussed in the scientific books (see Report of Fish Commission, page 102), that the seining of menhaden, and the pursuit of them by vessels, tends to drive them from out certain waters, and that the food fish which feed upon them are thereby deterred from coming in. In view of these facts, the statute in question is entitled to favorable consideration.

Respectfully submitted,

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Attorney-General.

HENRY C. BLISS,
Assistant Attorney-General.

APPENDIX A.

[CHAPTER 192, ACTS 1886.]

AN ACT FOR THE PROTECTION OF THE FISHERIES IN BUZZARD'S BAY.

Be it enacted, etc., as follows:

SECTION 1. No person shall draw, set, stretch or use any drag net, set net or gill net, purse or sweep sein of any kind for taking fish anywhere in the waters of Buzzard's Bay within the jurisdiction of this Commonwealth nor in any harbor, cove or bight of said bay except as hereinafter provided.

SECT. 2. Any net or seine used in violation of any provision of this act, together with any boat, craft or fishing apparatus employed in such illegal use, and all fish found therewith, shall be forfeited; and it shall be lawful for any inhabitant or inhabitants of any town bordering on said bay to seize and detain, not exceeding forty-eight hours, any net or seine found in use contrary to the provisions of this act, and any boat, craft, fishing apparatus and fish found therewith, to the end that the same may be seized and libelled if need be by due process of law.

SECT. 3. All nets and seines in actual use or stretched in the waters aforesaid in violation of this act are declared to be common nuisances.

SECT. 4. Nothing contained in this act shall be construed to interfere with the corporate rights of any fishing company located on said bay nor in any way to affect the fish weirs mentioned in section seventy of chapter ninety-one of the Public Statutes, nor the use of nets or seines in lawful fisheries for shad or alewives in influent streams of said bay, nor to

the use of set nets or gill nets in the waters of the town of Fairhaven within a line drawn from Commorant rock southwesterly to the buoy on West Island rips and from thence westerly in a straight course through the buoy on West Island ledge to the town line of Fairhaven.

SECT. 5. Whoever violates any provision of this act or aids or assists in violating the same shall pay a fine not exceeding two hundred dollars for each offence.

SECT. 6. District courts and trial justices shall have concurrent jurisdiction with the Superior Court of all offences and proceedings under the provisions of this act.

SECT. 7. All fines received under this act shall be paid one half to the complainant and the other half to the Commonwealth. All moneys from any forfeitures incurred under this act shall inure and be paid one fourth to the informer and one fourth to the person filing the libel and the other half to the Commonwealth. [*Approved May* 6, 1886.]

APPENDIX B.

VOL. IV., ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY, PAGE 743.

AN ACT TO PREVENT THE DESTRUCTION OF OYSTERS IN THE SEVERAL BAYS AND RIVERS HEREAFTER MENTIONED WITHIN THIS PROVINCE.

Whereas, it has been the practice for some years past for persons to come, with their vessels and boats, into the rivers and bays lying either in the towns of Wellfleet, Freetown, Swanzey, Dartmouth, Barnstable, Yarmouth, and in other of the bays, ports and rivers in this province, then and there to take the oyster beds, carry away from thence large

quantities of oysters, by means whereof said beds are almost destroyed, to the great prejudice both of the English and Indian inhabitants living in or near the towns aforesaid; for remedy whereof: —

Be it enacted by the Governor, Council and House of Representatives.

SECT. 1. That if any person or persons shall, at any time after the twenty-fifth of March next, presume to take any oysters, or to rake or sweep any of the oyster beds, lying either in the rivers or bays in either of the towns of Wellfleet, Freetown, Swanzey, Dartmouth, Barnstable, Yarmouth, or in any of the *bays, ports* or rivers in this province, without leave first had and obtained from the selectmen, or the major part of them, in writing, under their hands, in such town where the oysters may be taken, or where the beds may be raked or sweeped, as aforesaid, every person so offending shall forfeit and pay a sum not exceeding ten pounds, nor under forty shillings, to be recovered by action, information or presentment of a grand jury in any of his majesty's courts of record proper to try the same; unless the prosecutor shall see cause to bring the trial before a justice of the peace, in which case the justice may try the same; and the fine shall be forty shillings, and no more, one third thereof to and for the use of him that shall so inform or sue for the same, the other two thirds for the use of the poor of the town where the offence shall be committed.

Provided nevertheless,

SECT. 2. Nothing in this act shall be understood to hinder any inhabitant in this province from taking oysters for their own eating or for market in their own town, without

leave from the selectmen, as aforesaid: *provided*, the same be not sent out of the province.

SECT. 3. This act to continue and be in force for a space of three years from the twenty-fifth of March next, and no longer. [*Passed February* 28, 1765.]

APPENDIX C.

PLYMOUTH COLONY RECORDS, VOL. II., PAGE 220. 1668.

Whereas great complaint is made of great abuse by reason of fisherman that are strangers who fishing on the fishing ground on our coast in Catches dresing and splitting theire fish on board through their Garbidge ouerboard to the great anoyance of fish which have and may prove greatly detrementall to the countrey; It is ordered by the court that something be directed from this court to the court of the Massachusetts to request them to take some effectuall course for the restraint of such abuse as much as may be.

APPENDIX D.

PLYMOUTH COLONY RECORDS, VOL. II., PAGE 256. 1682.

The law prohibited the catching of fish before they haue spauned it is to be reveiued by the Commissioners att theire next sessions.

APPENDIX E.

PLYMOUTH COLONY RECORDS, VOL. II., PAGE 14. 1636.

That whereas God by his pvidence hath cast the fish called alewiues or herring in the midst of the towne of New Plymouth. And that the growned thereabout hath been worn

out by the whole to the damage of those that now inhabit the same. It is therefor enacted that the said herrings, alewiues or shadd commonly used in the setting of Corne be appropriated such as doe or shall inhabate the town of Plymouth aforesaid. And that no other haue any right or propriety in the same saue onely for baite for fishing and that by such an orderly course as shalbe thought meet by the Govr Assistant.

APPENDIX F.

PLYMOUTH COLONY RECORDS, VOL. II., PAGE 131. 1660.

It is enacted by the Court that noe stranger or foreigner shall improve our lands or woodsatt the Cape for the making of fish without libertie from the Gourment and that all such as shall haue libertie shall attend all such further orders as shalbe given themconserning the same; and that they shall pay six pence a kentellfor all such fish made as aforesaid to the colonies vse.

APPENDIX G.

COLONIAL LAWS, PAGE 53. 1668.

It is ordered by this court and the Authority thereof that no man shall henceforth kill any codfish, Hake, Hadduck, or Polluck, to be dried for sale in the month of December or January, because of their spawning time, nor any Mackrell to barrell upin the month of May or June, under penalty of paying five shillings for each quintal of fish, and five shillings for each barrell of Mackrell; nor shall any man cast the garbbage of the fish they catch overboard at or near the ledges or grounds where they take the fish; nor shall

any of the boats crew refuse or neglect to obey the order of the master of the vessel to which they belong, for the times and seasons of fishing; nor shall they take or drink any more strong liquors than the master thinks meet to permit them; the breach of these three lastbeing under the penalty of Twenty shillings for the first offence; for the second forty shillings; for the third three months imprisonment, one-third part of the aforesaid fines to the informer proving the same.

Do order and enact, that henceforth no Mackrell shall be caught, except for spending while fresh, before the first of July annually, on penalty of the loss of the same, the one one half to the informer and the other half to the use of the country. And any magistrate or county court is impowered to act herein to all intents and purposes, for the execution of this law.

APPENDIX H.

PLYMOUTH COLONY RECORDS, VOL. V., PAGE 104. 1672.

An order directed to Thomas Paine, the Water Bayley.

This Court being enformed that few or none of ours are like fish att the Cape by saine, and that diuers strangers desire libertie there to fish, these are therefor to impower you, in the behalf of the Court, to giue libertie to such strangers as shall desire there to fish, carrying orderly and paying such dues as by Court order is provided; and this shalbe youer warrant therein for this psent season.

APPENDIX I.

PLYMOUTH COLONY RECORDS, VOL. V., PAGE 107–8.
1672–3.

Whereas att the generall Court of his matie holden att New Plymouth in June, anno 1670, the Court vpon diuers serious considerations them thervnto moueing, did freely giue and graunt all such proffetts as might or should annually acrew or grow dew to this collonie from time to time, for fishing with netts or saines att Cape Codd for mackerell, basse, or herrings, as by the said grauntdoth fully apeer, to be imployed and improued for and towards a free schoole in some towne of this jurisdiction, for the training vp of youth in littrature for the good and benifitt of posteritie.

APPENDIX K.

ORDER OF 1672–3, PLYMOUTH COLONY RECORDS, VOL. V., PAGE 107.

Whereas att the Generall Court of his matie holden att New Plymouth in June anno 1670, the Court, vpon diuers serious consideration them thereunto mouing, did freely giue and graunt all such proffetts as might or should anually acrew or grow dew to this colonie from time to time, for fishing with netts or saines att Cape Codd for mackerell, basse or herrings as by the said graunt doth fully apeer, to be imployed and improued for and towards a free schoole in some towne of this jurisdiction, for the training vpof youth in littraturefor the good and benifit of posteritie, provided

that a beginning were made within one yeare after the said graunt; and that the ordering and managing of the said affairs was by the saib court committed to the Gov and Assistants or any four of them and that within the time limited there hath bin a beginning made att Plymouth, and hither to continue by God's blessing with goode successe, as vpon examination may apeer; and whereas the said towne in general have given and graunted whatsoeuer proffitts may in any way arise fromor by the improuement of a considerable tract of vplandand meadow belonging to the saib towne of Plymouth, lying and being att Agawaam, Sepecan, and places adjacent, for and towards the maintenance and vpholding af the said schoole att Plymouth, as alsoe since seueral of the towns ofPlymouth, out of theire good affections, have freely giuen out of their own estates for the erecting and procuring a conuenient scoole house, not onely for the better accomadating of the scollers but alsoe for the scoole master to liue and reside in, as God by his prouedence may please to psent, all the pmises being considered, in hope that God may please soe to smile on this our day of smale things as to make it a blessing to the rising generation.

This Court having taken themselues much obliged reddily and gladly to accept of that trustcomitted vnto them by the aforesaid Generall Court, and do heerby reddily accept thereof, and hope, by Gods assistance, faithfully and carefully to vse theire best endearuors what in them lyeth, to incurrage and carry on the said well begun worke att New Plymouth soe longas God shalbe pleased to affoared any competensie of meanes and convenient number of scholars, and to that end doe appoint and constitute our approued frind Mr. Thomas Hinckley, to take vpon him the office

care and charge of a steward of the said scoole, to demaund recouer and receiue all such sume or sumes of mony due from any pson or psons to the either by revenew of the aforesaid graunt of the Court or the graunt or gift of the towne of Plymouth or any otherwise due; and that hee doe giue a true accompt of all such moneyes receiued once or twise in the yeare vnto the Gou and majestrates, or any four of them, as it shalbe required, as alsoe to make such payments and disbursements to any imployed in or about the said worke as hee shalbe ordered by them, according to moneyes receiued be him on that accoump from time to time; and that hee by allowed due satisfaction for any trouble or expense about the said payment.

APPENDIX L.

PLYMOUTH COLONY RECORDS, VOL. V., PAGE 243. 1677.

The deputies were desired to acquaint theire townes respectiuely that if any of them will fish att Cape Codd, that such will meet at Plymouth, when the committee is to be together to agree vpon tearmes for fishing there.

APPENDIX M.

PLYMOUTH COLONY RECORDS, VOL. V., PAGE 244. 1677.

The country haue sett and to farme left theire privilidges and proffitts of fishing att the Cape vnto the treasurer, Mr. Huckens, Mr. Gray and Thomas Paine, for a terme of seuen yeers from the date heerof, for and in the consideration of the sum of thirty pounds a yeer to be payed in